Supreme Court, U.S.
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No. 86-1891

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MICHAEL J. HALLIWELL,
Appellant,

v.

MARCH FONG EU, SECRETARY OF STATE
OF THE STATE OF CALIFORNIA,
Appellee,

and

THE SENATE AND ASSEMBLY
OF THE STATE OF CALIFORNIA,
Appellee-Intervenors

On Jurisdictional Transfer from the
Ninth Circuit Court of Appeals
Under 28 U.S.C. § 1631

RELATED COMPLETE CATEGORIES FROM

DISTRICT COURT CASE RECORD APPENDIX

In Propria Persona

Michael J. Halliwell
2930 Colorado Avenue, #D-18
Santa Monica, California 90404
(213) 829-2821

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EDITOR'S NOTE

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FOREWORD

The methods of compilation and use of the Index to the Case Record and the Case Appendix in proceedings below are described in App. B at 73-77. This document brings together complete categories from the Index and the Appendix to the Case Record which are relevant to the questions presented in Appellees' briefs of June 26, 1987 seeking summary dismissal of this appeal.

The Table of Contents which follows is designed to provide quick access to summaries from the Index (which have decimal page numbers, e.g., Item #014.11 is at 0.001) and to the full text from the Appendix (which has the page numbers assigned there, e.g., Item #014.11 is at 24). To determine the positions of the participants on a given issue a user may consult the summaries in the decimal-numbered (front) section of this volume

and then look up those corresponding full texts which are most relevant, in the succeeding section.

COMPLETE CATEGORIES FROM DISTRICT COURT

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#014 ASSEMBLY DISTRICT

POPULATION DISPARITIES

014.11 Plaintiff contends

(24) at 1 Record 13:1-3

that the Assembly districts in A.B. 300 contain so many drafting errors that meaningful analysis of population equality and contiguity is very difficult.

014.21 Plaintiff contends

(24-25) at 1 Record 131:26-132:4

that only 1/3 of assembly districts are within the Reinecke IV 1% tolerance; no justifications are given for any of the 2/3 of all districts with population disparities which would require explanation under previously applied standards.

014.31 Plaintiff contends

(25) at 4 Record 70:18-71:6

that while it remains unclear what the assembly districts are, certain population

characteristics are apparent; Assembly v. Deukmejian orders no corrections for the A.B. 300 districts and admits that in the uncorrected districts the maximum population disparity is 15%; more than half of assembly districts exceed the disparity allowable under pendent jurisdiction over state-law claims.

014.42 (26) The Assembly contends at 11 Record 222:26-223:3 that according to the only evidence of record before this Court on the question of assembly district populations, the affidavit of James Tucker filed October 26, 1982, the maximum deviation in the California assembly districts is 3.92%.

014.44 (26-27) The Assembly contends at 5 Record 463:22-464:4 that the standard for state legislative districts is that they be "as nearly of

equal population as practicable"; the total range of population deviation among California's assembly districts is 3.92%, with the smallest being 1.98% smaller than the ideal and the largest being 1.94% greater than the ideal.

014.46 (27) The Assembly contends at 8 Record 9:6-13 that every Assembly district used in November 1982 was within 2% of the ideal population, with the smallest district 1.98% smaller than the ideal and the largest 1.94% larger than the ideal; the ratio of largest to smallest district is 1.005:1, the mean deviation from the ideal is -.05% and the median deviation is -.22%.

014.47 (27-28) Plaintiff contends at 8 Record 173:8-28 that the Assembly claims that the ratio

of largest to smallest district is 1.005:1, the mean deviation is -.05% and the median deviation is -.22%; actually the relative population disparity is understated by a factor of eight, the mean deviation is twenty times larger, and the median deviation is nearly five times as large as the Assembly claims.

014.48 (28-29) The Assembly contends at 8 Record 310:5-311:26 that Plaintiff argues that percentage deviations from the ideal are larger than those stated by the Assembly, but even Plaintiff's figures do not amount to a prima facie case of unconstitutionality; the Assembly does not comment upon or concede the accuracy of Mr. Halliwell's mean and median deviation computations, but his population ratio calculation is correct, and the Assembly apologizes for its own computational error.

014.61 Plaintiff contends
(29-32) at 10 Record 202:18-204:2
that the Assembly's last line of defense for its claimed population disparities is that "interim plans are subject to less stringent equal protection standards than those controlling regular reapportionment plans"; this rationale will not support the constitutionality of the Assembly plan because standards for interim plans are relaxed only to the degree required by practical necessity and the rejected alternative plans had substantially smaller population disparities than A.B. 300.
Accord: 3 Record 343:2-24.

014.71 Plaintiff contends
(32-45) at 13 Record 149:5-155:25
that the Assembly has sought to evade judicial enforcement of one-man-one-vote requirements applicable to state legislative districts by making unverifiable

claims about a poorly defined version of the districts which has no legal status; even if Plaintiff were to demonstrate serious errors in the populations claimed for districts which incorporate the Tucker corrections proponents have left themselves an escape hatch, as they admit their population figures are based on "somewhat imprecise" estimates.

014.81 (45-46) Plaintiff contends at 8 Record 530:4-11 that according to Rose Institute population figures the smallest 1983 assembly district is 65 AD = 275,482 and the largest is 17 AD = 301,369; this disparity of 28,529 exceeds constitutional limitations, and the percentage disparity is larger than several which have been ruled unconstitutional even when they involve much smaller numbers of people.

#024 PRACTICAL NECESSITY OF USING THE LEGISLATURE'S PLANS

024.12a The Senate contends
(224) at 3 Record 22:4-24:11
that absent a showing of arbitrary or capricious action on the part of a state supreme court, no Fourteenth Amendment violation exists; failing a prerequisite showing of arbitrary action by the state court, a federal district court should not entertain Plaintiff's suit.

024.12b Plaintiff contends
(224-227) at 3 Record 292:2-293:17
that there are several instances of arbitrary and capricious action of the California Supreme Court which taken together completely circumvented provisions of the California Constitution designed to restrict the gerrymandering of legislative districts; these include abrogation of referendum stay provisions and refusal to

enforce Article XXI.

Accord: 11 Record 42:3-43:20.

024.15 (227-230) Plaintiff contends at 5 Record 226:2-227:8 that Assembly v. Deukmejian invokes compelling practical necessity, not state law, as justification for abrogating the referendum stay provisions of the California Constitution; however, when faced with a similar situation in Arizona, the federal district court in Klahr v. Williams routinely upheld the right of referendum.

024.21 (230-233) Plaintiff contends at 3 Record 213:9-215:3 that there is absolutely nothing that the opponents of the Legislature's redistricting plans could have done which they did not do to minimize the practical obstacles to using different legislative districts; even so, the California Supreme Court's

majority has clung resolutely to its alleged "practical obstacles" which "obviate any possibility of giving consideration to alternate plans."

Accord: 1 Record 16:22-23.

024.27 (233-237) Plaintiff contends at 4 Record 198:25-200:27 that in selecting the redistricting plans supported by her own political party the Secretary of State picked the least constitutional of all the available plans; moreover, even at the time Assembly v. Deukmejian was handed down many of the alternative plans were still administratively feasible because they were much less complicated than the Legislature's plans.

Accord: 1 Record 11:9-15,
1 Record 47:3-26,
1 Record 201:3-22,
2 Record 2:6-20,

3 Record 300:16-301:19.

024.33 Plaintiff contends
(238) at 9 Record 14:2-18:8
that not only is a direct tax on voting unconstitutional, so is any fiscal policy which burdens this precious right; while the states enjoy broad latitude in many areas, decisions of the High Court unequivocally recognize that federal protection for political rights is an essential ingredient of viable federalism.

024.39 Plaintiff contends
(238-243) at 7 Record 286:2-288:18
that in their search for some plausible rationale for ignoring constitutional requirements and mandating the use of blatantly gerrymandered districts Chief Justice Bird and her Brown-appointed colleagues consumed so much time considering a frivolous challenge to referendum

petitions lodged against the Legislature's plans that there was allegedly too little time to implement any other districts but the Legislature's.

Accord: 7 Record 95:17-96:28.

024.45 (243-246) Plaintiff contends at 7 Record 289:14-291:5 that it is simply absurd to suppose that with the resources available to it the California Supreme Court could not have devised redistricting plans both administratively and constitutionally superior to those adopted by the Legislature and blocked by referendum petition; if the Court believed that the voters might actually accpet the Legislature's plans a special election could have been held any time up to two months before the June primary.

024.53 Plaintiff contends
(247-250) at 5 Record 263:24-265:17 that the collaborative effort to subvert the constitutional requirements for redistricting began with the Legislature, which consistently tried to minimize public scrutiny of its plans and thereby handicap efforts to enforce constitutional limitations; the total result of these partisan maneuvers, in which the Governor personally participated and the which the State Supreme Court implicitly sanctioned, was delay which has made judicial review as late and as difficult to obtain as possible.

Accord: 1 Record 16:22-32,
3 Record 193:3-194:22,
3 Record 385:5-8, 392:23-393:12.

024.59 Plaintiff contends
(250-254) at 10 Record 139:7-141:15 that when the California Supreme Court

decided Assembly v. Deukmejian on January 28, 1982 there still was plenty of time to program computers to use any of the model plans which consisted largely of whole counties, cities and census tracts; there was even enough time for the Court to draft its own plan if single-office paper ballots were used for legislative primary elections.

Accord: 3 Record 337:7-16.

024.67 (254-257) Plaintiff contends at 4 Record 201:2-202:14 that the California Supreme Court cited many legal reasons why the 1982 elections must be conducted in districts reapportioned according to the 1980 census, but it did not and could not cite any legal reason for using the Legislature's redistricting plans; this aspect of the majority opinion in Assembly v. Deukmejian is supported only by the Court's "equitable

discretion."

024.75 (257-260) Plaintiff contends at 13 Record 9:11-10:28 that in spite of Bullock v. Carter, which holds that financial considerations cannot "justify an incursion on the prerogatives of voters," the Secretary of State ruled out the use of constitutionally adequate redistricting plans to save "the extraordinarily high cost of adding staff to cut production time" and the California Supreme Court abrogated referendum stay provisions to save the $12 million cost of a special election.

024.83 (260-262) Plaintiff contends at 13 Record 122:20-123:19 that if congressional district population disparities cannot satisfy the strict limitations of Article I § 2 then Plaintiff is entitled to post-election relief

unless bona fide administrative considerations precluded the use of constitutional congressional districts for the 1982 elections; Plaintiff has documented the availability of alternative congressional plans with smaller population disparities and superior compliance with all other constitutional requirements.

#027 DEFECTIVE MODE OF ENACTMENT OF THE 1983 REDISTRICTING PLANS

027.11 Plaintiff contends
(312) at 6 Record 57:3-11
that there was no extraordinary occasion (as required by Article IV § 3b of the California Constitution) requiring the Legislature to adopt redistricting legislation at a special session. Adoption of such legislation by a legislature which has not been constitutionally elected undermines the integrity of California's political process.

027.15 Plaintiff contends
(312-318) at 11 Record 289:24-292:22
that the period of time from December 6, 1982 until January 3, 1983 was not an "extraordinary occasion" requiring the enactment of redistricting plans for use in the 1984 elections. The special session on redistricting obviously was called

to evade the mandate of the 1982 elections wherein the Democratic Party lost control of the Governor's Office.

Accord: 8 Record 538:4-27.

027.25 (318-319) Plaintiff contends at 8 Record 538:20-539:6 that because none of the challenges to the legality of the Legislature's 1981 redistricting plans was adjudicated on the merits due to blatant disregard of established binding judicial procedures by state and federal judges who owe their careers to Jerry Brown and Alan Cranston, illegally elected state senators and assemblymen were able in 1983 to cement themselves into office with new districts tailored to maximize their advantage over potential opponents.

027.35 (319-321) Plaintiff contends at 11 Record 286:11-287:11

that almost immediately upon being sworn into office members of the Legislature elected from the districts rejected in the June 1982 referenda, operating under a suspension of normal rules at an illegally called special session, acted with the aid of lame-duck Governor Jerry Brown to enact districts protected by an illegal urgency clause from another referendum challenge to perpetuate themselves in office for the balance of the decade.

027.45 (321-322) Plaintiff inquires of the Assembly at 13 Record 307:8-11: does the Assembly admit that when Republican analysts used the computer facility provided to them to generate documentation for legal challenges to the Legislature's redistricting plans, access to this facility was terminated by order of the Speaker?

027.65 (322-324) Plaintiff contends at 10 Record 142:28-143:26 that the 1983 redistricting plans have been enacted and protected from repeal by a variety of illegal means. The districts were adopted by a legislature elected while some districts were disenfranchised and others double represented, a legislature acting at an illegal special session. These districts were protected from initiative and referendum challenges by illegally suspending these constitutional provisions.

027.75 (324-325) Plaintiff contends at 10 Record 145:27-146:26 that the Legislature's 1983 congressional plan was enacted by means of an illegal procedural maneuver which violated Article IV § 8b of the California Constitution, which requires three readings on three separate days to enact any bill unless

this requirement is dispensed with by a two-thirds majority.

#028 UNAUTHORIZED REVISIONS TO THE 1982 DISTRICTS

028.11 Plaintiff contends
(326) at 1 Record 192:3-11
that the 22 AD must have been thrown together just as the redistricting bill was being printed; some of the partial tracts don't even list blocks in numerical order. This district represents a bold new advance in reapportionment thinking: pass a thumbnail sketch of a district, then fill in the details after the Legislature has voted. There are 42 changes for this one district in the Secretary of State's corrections list.

028.22 The Assembly contends
(326-327) at 8 Record 308:21-26
that Plaintiff provides no evidence of uncorrected errors in the assembly plan; the California Supreme Court ordered use of the Legislature's plans as corrected;

see Assembly v. Deukmejian, 30 Cal.3d 638, 666, n. 22.

028.25 (327-328) Plaintiff contends at 4 Record 76:10-17 that Assembly plan proponents submitted a list of 277 corrections to the California Supreme Court one day before the oral arguments on Assembly v. Deukmejian. There is no support in the California Supreme Court's decision for the Secretary of State's contention that the Court intended to adopt these corrections.

028.29 (328-329) Plaintiff contends at 4 Record 9:24-10:9 that the population figures provided by Mr. Remcho are for a revised version of Assembly districts which incorporate 277 departures from the legal descriptions of these districts. Mr. Remcho admits that additional errors beyond these 277 have

since been found, and these will certainly affect the accuracy of the claimed populations and may affect contiguity as well.

028.33 (329-330) Plaintiff contends at 4 Record 298:23-299:8 that the majority opinion of Assembly v. Deukmejian makes no mention whatever of the list of 277 corrections which Mr. Remcho filed on the day preceding the hearing. Since the Court referred only to the enacting legislation, only typographical or other textually demonstrable errors may be corrected, as per the procedures set forth in Silver v. Brown.

028.37 (330-334) Plaintiff contends at 8 Record 163:3-165:3 that apparently the Assembly gave up any effort to prove that districts set forth in A.B. 300 and adopted by the California

Supreme Court do satisfy population equality requirements and sought to preclude a challenge in federal court to the validity of the 1982 assembly elections by instead using another set of districts with 277 changes from the districts set forth in A.B. 300.

028.42 (334-335) The Assembly contends at 8 Record 310:23-25 that the correction of technical errors in the Assembly plan was both statutorily authorized by Cal.Elections Code § 30000 and presented to and accepted by the California Supreme Court.

028.43 (335-337) Plaintiff contends at 10 Record 164:26-165:28 that Section 30000 of A.B. 300 cannot possibly authorize "technical corrections" to the Assembly plan, as this provision was blocked by referendum petitions in

1981 and rejected by the electorate in 1982. Moreover, § 30000 applies only to the use for interpretative purposes of maps which had been prepared by the Legislature in connection with the enactment of its redistricting plans, not to the use for such purposes of maps concocted after enactment.

028.47 (337-343) Plaintiff contends at 13 Record 197:2-199:20 that while most of the A.B. 300 districts are not so riddled with errors as 22 AD, a different version of 85% of districts from that embodied in the corrected version of the 1981 assembly redistricting approved by the Legislature and signed by the Governor has been foisted upon the people of California. So many changes have been made that they amount to a wholesale revision, not merely "technical corrections."

028.51 (343-349) Plaintiff contends at 13 Record 476:6-479:9 that neither the Assembly nor anyone else has cited any authority for the proposition that a court of law should evaluate the constitutionality of any version of a redistricting plan other than that established in law. Ever since Yick Wo v. Hopkins (1886) any power to make "technical corrections" committed "to the unrestrained will of a single public officer" has been ipso facto grounds for invalidation.

028.61 (349-351) Plaintiff inquires of the Assembly at 13 Record 295:3-17: if any documents exist which authorize these 38 revisions to the A.B. 300 assembly districts Plaintiff hereby requests a copy of them. If the revisions were authorized by maps Plaintiff requests an explanation of when the maps were prepared

and the extent to which they were relied upon in adopting the I982 assembly plan.

028.67 (351-352) Plaintiff inquires of the Assembly at 13 Record 300:12-301:9: does the Assembly admit that the discrepancies between its own corrected version of the Assembly Plan and the text of the enacting legislation are more numerous, are more substantial, and involve more people than those which the Assembly alleged invalidated referendum petitions filed against A.B. 300?

028.75 (353) Plaintiff contends at 1 Record 196:2-8 that the attitude of proponents of A.B. 301 congressional districts seems to have been to "tough it out" and ignore any defects in their bill that were not very minor. While the Secretary of State

accepted contiguity and equalization population as the basis for many assembly district corrections, no such standards were applied to congressional districts.

028.85 Plaintiff contends
(353-354) at 10 Record 166:13-20
that the unauthorized corrections to the Legislature's 1981 congressional plan are certainly less far-reaching than the corrections to the 1981 Assembly Plan; however, none of the Defendants has ever contested Plaintiff's statement that many of these congressional corrections are in fact politically motivated and/or contrary to the unambiguous provisions of A.B. 301.

028.95 Plaintiff contends
(354-355) at 1 Record 199:6-14
that quite unlike the corrections process for the two redistricting bills in which the Assembly reapportionment committee

played the major role, the corrections process for the Senate's redistricting plan was quite straightforward. There were only 5 census tracts unassigned in the Senate's redistricting plan after the passage of cleanup legislation.

#029 UNAUTHORIZED REVISIONS TO THE 1984 DISTRICTS

029.31 (356-357) Plaintiff contends at 10 Record 174:17-28 that after oral arguments before the U.S. Supreme Court in Karcher v. Daggett Democratic officials implemented a series of unauthorized corrections to the California congressional plan to remedy defects similar to those which had been criticized by key justices in the New Jersey congressional plan at issue in Karcher.

029.35 (357-358) Plaintiff contends at 10 Record 174:3-15 that the Secretary of State has no discretion to refuse to submit portions of a redistricting bill passed by the Legislature and signed by the Governor to county clerks for implementation. As the California Supreme Court has noted, the questions involved in district revisions may

involve difficult legal issues that only a court can determine.

029.43 (358-366) Plaintiff contends at 10 Record 166:25-170:26 that in many instances revisions to the 1983 congressional plan were in clear conflict with the original legislative intent. One particularly well-documented instance involved 16 CD, where, to secure the crucial 21st vote needed for passage from Senator Mello, an amendment was adopted to reduce the fragmentation of Santa Cruz County. This amendment was reversed in the "corrections" process.

029.53a (366-368) Plaintiff contends at 12 Record 72:6-73:3 that even though this Court's order of April 19, 1983 affirmed the obligation of the Secretary of State to defend the use of the contested districts, Defendant has

refused to provide any justification for her simply ignoring the law by repeatedly substituting her own version of various districts for those actually mandated by the proper authorities.

029.53b (368-369) Defendant contends at 13 Record 462:26-463:7 that Plaintiff's inquiry seeking boundary descriptions of the current congressional districts is not relevant to the subject matter of the pending litigation, and his request therefore does not fall within the scope of discoverable material.

029.53c (369-370) Plaintiff inquires of Defendant at 13 Record 288:3-19: Plaintiff has reason to believe that in many instances the congressional districts California currently is using are not those established in law. Plaintiff hereby requests an explanation of any such

district modification; if these modifications are authorized by maps, Plaintiff requests an explanation of when the maps were prepared and the extent to which the Legislature relied upon these maps in adopting these districts.

029.55 (370-373) Plaintiff contends at 13 Record 574:4-575:9 that determination of which districts are actually being used to conduct California's elections is obviously an essential preliminary to a broad range of permissible lines of inquiry. Most importantly, this bears on Plaintiff's complaints regarding the Secretary of State's continuing practice of operating outside the law in her stewardship of the elections process to advance the interests of the Democratic Party.

#081 ABROGATION OF REFERENDUM STAY PROVISIONS

081.11 Plaintiff contends
(491) at 6 Record 135:19-136:2
that the California Supreme Court justified adopting as its own plans the very same districts which had been blocked by referendum petition on the grounds that it would take so long to program computers to use any of the alternative redistricting plans available to the Court that a separate primary election might have to be held for district offices, at an estimated cost of $12 million.

081.15 Plaintiff contends
(492-493) at 3 Record 171:12-172:28
that the 1982 elections were conducted in the very districts blocked by referendum petitions and rejected by the voters. Legislators elected from these districts were then able to pass another redistrict-

ing plan to preserve their seats, block any new referendum challenge, and thus perpetuate their districts indefinitely.

Accord: 1 Record 15:30-8,
1 Record 222:22-223:6,
2 Record 5:12-27,
3 Record 387:5-8, 400:7-10.

081.21a (493) The Assembly contends at 3 Record 241:25-242:3 that the California Supreme Court found the principle of one person, one vote so compelling that it held that Article II § 10 of the California Constitution, which stays the effective date of a statute subject to referendum, must give way before it.

081.21b (493-494) Plaintiff contends at 3 Record 338:15-339:2 that there is no support in any decision of the U.S. Supreme Court for the position

that population shifts during the ten years between reapportionments must be corrected immediately even if this requires gross violations of constitutionally prescribed political processes.

081.27 (494-496) Plaintiff contends at 10 Record 218:21-219:18 that even if no other new districts other than the Legislature's were available or could have been devised, Lucas v. Colorado General Assembly makes it clear that a constitutionally required redistricting may be delayed for one election to allow a state's political processes to function.

081.33 (496-497) Plaintiff contends at 3 Record 178:8-26 that it is true that a special election for California's 11 million voters would cost $12 million or $1.09 per voter. Many Americans have laid down their lives to

defend our system of free elections. Is the right of each voter to vote in legislative elections conducted according to constitutional requirements not worth $1.09? The chemicals in a human body are worth more than that.

081.39 (498-499) Plaintiff contends at 3 Record 293:18-294:4 that under the California Constitution a plan blocked by referendum petition is outside the scope of consideration of the Legislature and the courts and is therefore of lesser status than other plans which might be suggested. In fact, the negative status of redistricting plans blocked by referendum involves not only the plans themselves but also all other plans that are not essentially different.

081.47 (499-501) Plaintiff contends at 3 Record 180:14-181:10

that it is precisely because legislators have consistently flouted the public will on redistricting that the voters amended Article XXI into the State Constitution. Thus there is no factual basis for Chief Justice Bird's assertion that "the Legislature's action on redistricting is the nearest approximation to the public will," however reasonable it might be regarding most other issues except legislator's salaries and benefits.

Accord: 1 Record 224:18-225:23.

081.55 (501-502) Plaintiff contends at 5 Record 224:2-23 that the only part of the decision in Assembly v. Deukmejian which Plaintiff disputes is the equitable discretion portion, which orders into effect the very districts which have the least possible status under California law. It is clear that under powers reserved by the people

of California "unto themselves" (not merely denied to the Legislature) any definition of state reapportionment policy by the electorate takes precedence over a contrary decision by the State Supreme Court.

Accord: 5 Record 224:12-19.

081.65 (503-506) Plaintiff contends at 10 Record 214:24-216:14 that the special status of political rights reserved by the people unto themselves is not simply a matter of long-established precedent. Article I § 3, adopted by the electorate on November 5, 1974, states that "The people have the right to instruct their representatives." This applies equally to positive instructions via the initiative and negative instructions via the referendum.

081.75 Plaintiff contends
(506-511) at 5 Record 256:21-259:16 that the California Supreme Court has no authority to abrogate the referendum provisions of the California Constitution on the grounds that a "mere" 5% of the electorate should not be allowed to create a nuisance. As the Court notes in Graves v. Barnes, "It will ultimately serve no one for us to ignore constitutional norms in the name of convenience and administrative inertia."

081.85 Plaintiff contends
(511-513) at 8 Record 297:17-298:14 that it is Chief Justice Bird and her supporters on the California Supreme Court who have restructured public decisionmaking in California. By abrogating referendum stay provisions the majority opinion in Assembly v. Deukmejian nullified the will of the framers of the State Constitution and of the people themselves.

#082 VITIATION OF THE JUNE 1982 REFERENDA

082.11 Plaintiff contends
(514-515) at 8 Record 512:4-15
that it would be a political miracle if a legislature with an overwhelming personal stake in preserving a scheme of legislative districting which produces essentially the same political results nevertheless enacted essentially different redistricting plans. No such miracle has occurred, as the 1983 redistricting plans provide districts even safer for incumbents than those used in 1982.

082.31 Plaintiff contends
(515-520) at 10 Record 300:21-303:6
that none of the Legislature's 1983 redistricting plans comes close to being essentially different from the districts which the voters rejected in June of 1982. The average congressional district is 90% the same as its predecessor in A.B. 301, the

average senate district is 91% the same as in S.B. 99, and the average assembly district is 92% unchanged from its A.B. 300 version.

082.41 Plaintiff contends
(520-523) at 8 Record 539:8-541:4
that prompt compliance with constitutional requirements is certainly commendable, but there was certainly no administrative excuse for invoking "the public health or safety" to impose the Legislature's plans to redistrict itself without allowing an opportunity to reject the new districts by referendum and no extraordinary occasion which justified a special session to rush redistricting legislation to the lame-duck governor.

082.61 Plaintiff contends
(523-524) at 10 Record 318:18-27
that it is precisely because there is no

basis whatsoever for supposing that the electorate would find the new redistricting plans acceptable that the architects of these plans protected themselves from the voters' wrath by enacting their own plans with an urgency clause so that the plans could not be subject to referendum.

082.81 (524-525) Plaintiff contends at 13 Record 351:11-18 that before the constitutionality of the 1982 districts was adjudicated legislators elected from these districts enacted redistricting plans which were 90-92% unchanged from those resoundingly rejected by the people. Since these districts are to be used for the balance of the decade, the impairment of political rights is much greater than if the people were deprived of effective control of their political institutions for only one election.

#087 GUARANTY CLAUSE PROTECTION OF POLITICAL RIGHTS

087.11 Plaintiff contends
(571) at 9 Record 257:23-28
that while there is substantial diversity of opinion among sitting members of the U.S. Supreme Court on the scope of "state's rights" in cases involving federal issues, the Justices, from the most liberal to the most conservative, all support the propriety of federal intervention to assure political equality and effective popular sovereignty.

087.19 Plaintiff contends
(571-572) at 4 Record 207:12-28
that majority rule cannot exist, of course, without equality of representation. The importance of equality in a republican form of government is affirmed by the U. S. Supreme Court in United States v. Cruikshank: "The equality of rights of

citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle if within its power."

087.27 (573-575) Plaintiff contends at 4 Record 206:11-207:11 that it is precisely because the right to cast a meaningful vote is so fundamental that the abrogation of the referendum powers of the people of California is a serious abridgement of a republican form of government; this is all the more so because the subject matter of the referendum was central to the political process itself. At one stroke the California Supreme Court took from the people the control of their state and federal legislative institutions.

087.35 Plaintiff contends
(575-577) at 5 Record 98:4-99:4
that the most serious violation of the Guaranty Clause is the abrogation by the California Supreme Court of referendum rights reserved by the California Constitution unto the people themselves. Article IV § 4, which guarantees "to every state in this Union a Republican Form of Government," must at the very least mean, as affirmed in Chisholm v. Georgia, that the "supreme power resides in the body of the people."

087.43 Plaintiff contends
(577-579) at 4 Record 198:8-24
that the abridgment of republican government which has occurred in California involves congressional, senate and assembly districts which flagrantly violate the requirements for such districts contained in Article XXI and which have been blocked

from enactment by referendum petition and subsequent rejection by the voters according to the provisions of Sections 9 and 10 of Article II.

087.51 (579-580) Plaintiff contends at 3 Record 301:12-29 that none of the defendants has attempted to justify the flimsy contrivances employed by the California Supreme Court to produce "compelling practical reasons" for ignoring alternative redistricting plans and mandating the Legislature's redistricting plans in spite of their numerous constitutional defects.

Accord: 1 Record 204:4-205:14,
3 Record 360:14-26.

087.61 (580-582) Plaintiff contends at 7 Record 111:18-112:10 that political reformers and the majority of the electorate which they represent

have been utterly betrayed by the California Supreme Court which has refused to enforce and has actively violated its own State Constitution. The defenders of the integrity of California's institutions of representative democracy therefore properly invoke the last line of defense for the rule of law, the Guaranty Clause of Art. IV § 4 of the U.S. Constitution.

087.71 Plaintiff contends
(582-599) at 12 Record 81:4-89:19
that any notion that the Guaranty Clause of Article IV § 4 is a dead letter simply because it has never been successfully invoked runs contrary to the explicit provisions of Article III §2(1) and the affirmation of Marbury v. Madison: "It cannot be presumed that any clause in the Constitution is intended to be without effect," and "It is emphatically the province and duty of the judicial department to say what the law is."

#089 EROSION OF POLITICAL LEGITIMACY

089.05 Plaintiff contends
(615) at 1 Record 6:18-23
that the primary aggrieved party when elections are not constitutionally conducted is not "real parties of interest" such as Democrats or Republicans, nor incumbents congressmen and state legislators, but the general public, who are deprived of the one right of citizenship without which defense of any and all other rights may be impossible.

089.09 Plaintiff contends
(615-616) at 1 Record 17:10-18
that elections conducted in districts which grossly violate state and federal constitutions do irreparable damage to the legitimacy of legislators elected from them and will also do irreparable injury to public confidence in the fairness of political institutions.

089.21 Plaintiff contends

(616) at 1 Record 50:4-9

that the abuse of political power tends to become more extreme as previous examples appear to validate the practices involved. In this instance the partisan favoritism previously shown in the sensitive tasks involved in the conduct of elections by the officials of the opposition party is readily cited as justification for tilting the scales in the opposite direction.

089.27 Plaintiff contends

(616-617) at 1 Record 242:2-13

that the injury faced by Plaintiff and other California voters is not only the defeat of candidates who might effectively represent their interests in government; more important is potential damage to the fabric of government itself and the erosion of public confidence in the

fairness of the political process arising from the use of flagrantly gerrymandered districts.

089.29 Plaintiff contends
(617) at 1 Record 242:14-25
that the strain on our democratic institutions is more severe in times of economic distress, when many are losing faith in the effectiveness of government. To destroy faith in the fairness of legislative elections at such a time can have consequences ranging from a sharp decline in electoral participation to civil insurrection which produces a backlash that threatens basic freedoms.

089.41 Plaintiff contends
(618-619) at 3 Record 299:24-300:15
that the Weimar Republic failed because of a system of proportional representation that kept most of the seats perpetu-

ally in the hands of a group of insiders in each of the political parties, and this same sort of situation can arise when a state is carved into safe Democratic and Republican districts skillfully tailored for specific candidates.

089.61 (619-621) Plaintiff contends at 3 Record 216:2-28 that Plaintiff has urgently pleaded with the California Supreme Court to hold a hearing on the constitutionality of the plans which the Court ordered into effect on its own authority. The California Court turned a deaf ear to this and all other pleas that it rule on the constitutional merits of its own redistricting plans.

089.81 (621-622) Plaintiff contends at 3 Record 219:3-17 that if government of the people, by the

people, and for the people does indeed perish in this country it is unlikely that this will happen as a result of a military coup against a government which citizens consider to have been fairly elected. It is much more likely that the legitimacy of our elected officials will first be destroyed by a series of actions such as have taken place in this case.

#185 GUARANTY CLAUSE IMPLICATIONS

185.11 Plaintiff contends (1617-1618) at 4 Record 220:19-221:11 that in Baker v. Carr the court differentiates nonjusticiability from lack of jurisdiction: "In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded."

185.21 Plaintiff contends (1618-1620) at 4 Record 202:15-203:15 that in most previous Guaranty Clause cases some peripheral aspect of state government has been involved; where an alleged usurpation of power has involved control of a state government itself,

judicial misconduct has never been a factor. Even so, there are ample precedents, such as Chisholm v. Georgia, to permit evaluation of the merits of the Guaranty Clause claim presented in this case.

185.29 (1620-1623) Plaintiff contends at 4 Record 203:17-205:11 that the rule of law component of a republican form of government, especially the judicial obligation to uphold written constitutions, is defined in Marbury v. Madison: "the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments are bound by that instrument."

185.35 Plaintiff contends
(1624-25) at 4 Record 209:24-210:15 that in mandating the adoption of redistricting plans which have been blocked by referendum, the California Supreme Court has violated the primary attribute of republican government set forth in Chisholm v. Georgia: "One constructed on the principle that supreme power resides in the body of the people." In ignoring the constitutional defects of the redistricting plans which it orders into effect the California Supreme Court has brazenly transgressed the principles of the rule of law set forth in Marbury v. Madison.

185.51 Plaintiff contends
(1625-29) at 8 Record 298:15-300:22 that Plaintiff's Guaranty Clause claims rely on explicit definitions of the essential elements of republican government contained in Chisholm v. Georgia, In re

Duncan and Marbury v. Madison. The fact that all recent political rights cases which have reached the U.S. Supreme Court have been decided on 14th Amendment rather than Guaranty Clause grounds is simply a reflection of the fact that a state's institutions of representative democracy are seldom given so crippling a blow as has been dealt by the California Supreme Court.

185.61 Plaintiff contends (1629-1634) at 10 Record 329:4-331:6 that the rejection of prior Guaranty Clause claims which were trivial in comparison to those in Halliwell v. Eu does not undermine the viability of the Guaranty Clause. Indeed, in dismissing a jurisdictionally insubstantial Guaranty Clause claim the Supreme Court affirmed its "everpresent duty whenever it becomes necessary in a controversy properly sub-

mitted to enforce and uphold the applicable provisions of the Constitution as to each and every exercise of governmental power."

185.71 (1634-39) Plaintiff contends at 5 Record 280:27-283:21 that the last line of defense for the rule of law is the Guaranty Clause of the U.S. Constitution. It is of critical importance that the U.S. Supreme Court clearly draw a line that demarcates tolerance of political usurpation from comity and federalism. It is hardly appropriate to wait for an even more severe breakdown in constitutional government before reaffirming that the Guaranty Clause does indeed protect a state's institutions of representative democracy.

#524 THIS ACTION IS MOOT.

524.12 Judge Karlton rules
(2836) at 3 Record 43:20-25
that resolution of all other matters besides the motions brought on pursuant to the order of May 4, 1982 is deferred pending the Court's disposition of these motions, as it now appears that Plaintiff may still obtain a legally efficacious remedy should he then prevail on the merits of this action.

524.22 Defendant contends
(2836-37) at 7 Record 41:11-16
that Plaintiff has no live dispute with Defendant Secretary of State now that the 1982 primary and general election has been held; with no live issue remaining to be resolved, Defendant submits that as a matter of law she is entitled to judgment.

524.32 The Assembly contends
(2837-38) at 8 Record 13:14-26
that even if there were some legal basis for invalidating the assembly reapportionment plan used in 1982, the appropriate remedy would be an order ensuring that no further elections be conducted under it; because the California Legislature already has taken that step, any such order by the Court here would be an empty gesture.

524.42a The Senate contends
(2838-39) at 7 Record 20:4-13
that Plaintiff challenges the adoption of temporary court-ordered reapportion plans for the 1982 elections which have been held; since a statute reapportioning the senate districts for the 1984 elections is presently in effect this Court lacks subject matter jurisdiction, as this action is moot.

524.42b (2839-2840) Plaintiff contends at 7 Record 336:18-337:5 that the position of the Senate before the June primary was that "Plaintiff's challenge of the legislative redistricting statutes is not ripe." Then the Senate's position became, "any relief which Plaintiff seeks clearly and unequivocally would disrupt California's electoral process." Now the Senate's position is that "This action is moot." Thus according to the Senate there never was a time when it need be held accountable for the constitutionality of its districts.

524.51 (2840-43) Plaintiff contends at 13 Record 221:1-223:20 that at the February 16, 1983 hearing the Court tried in vain to pin down the Senate on mootness. "JUDGE KARLTON: Ma'am, answer my question. Mr. Halliwell says

that by virtue of the plan adopted by the Senate, certain persons were, in effect, disenfranchised; is that true? [SENATE:] For the '82 elections? JUDGE KARLTON: Yes, what's moot? [SENATE:] Okay, the statute was never in effect. JUDGE KARLTON: The question is, when you talk about mootness, you are talking about whether there is a live controversy before the Court. There are folks sitting there, Mr. Halliwell claims, pursuant to an unconstitutional process. Now is that claim moot, and if so, why? [SENATE:] Your Honor, I can only repeat what I have said."

524.62 (2843-45) The Senate contends at 13 Record 423:19-424:21 that there is no basis for reconsideration of this Court's finding that even had Plaintiff been able to identify constitutional defects in the court-order reapportionment plan, prospective relief would

be unnecessary and perhaps even counter-productive, since the court-ordered districts would soon be phased out and replaced by new districts enacted by the Legislature.

524.82 (2846-47) Defendant contends at 12 Record 459:21-460:8 that the need for prospective relief regarding the congressional districts Plaintiff seeks to challenge was effectively mooted by the successful referendum campaign against A.B. 301; accordingly, there is no present case or controversy raised by the complaint in this action regarding California's congressional districts.

524.83 (2847-49) Plaintiff contends at 14 Record 53:7-54:13 that even though the 1982 elections have indeed passed into history their consti-

tutionality is not moot. In County of Los Angeles v. Davis the U.S. Supreme Court notes: "The burden of demonstrating mootness 'is a heavy one.' See United States v. W.T. Grant Co." The Davis court lays down two conditions, both of which must be satisfied in order for a claim to become moot: "(1) it can be said with assurance that 'there is no reasonable expectation' . . . that the alleged violation will recur, see W.T. Grant supra, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation."

524.84 (2849-2850) Judges Kennedy, Karlton and Ramirez rule at 15 Record 201:19-202:2 in the Order of July 9, 1985 that all parties appear to concede that the A.B. 301 plan is no longer in operation because it was defeated in a referendum election

by the voters of California. Nor is the Supreme Court plan in operation, the Legislature having adopted a new plan. This is therefore not a case of the defendant voluntarily ceasing its conduct as the result of the lawsuit; it was the action of other persons, not party to the litigation, which mandated the cessation of the challenged conduct. See Iron Arrow Honor Society v. Heckler concerning voluntary cessation of activities by third-parties causing mootness.

524.85 (2850-54) Plaintiff contends at 15 Record 251:26-253:27 that Iron Arrow provides no basis for mootness in Halliwell v. Eu, most notably because that opinion stresses the independence of the University's action quite apart from any regulatory action by Defendant Heckler. In Halliwell v. Eu plaintiff has stressed from the outset

and provided frequent demonstrations of the fact that the contested districts and their essentially unchanged successors were imposed by means of political collusion of Democratic officials in the legislative, executive and judicial branches of government. Moreover, A.B. 301 is the very plan adopted by the California Supreme Court, so when the Legislature (both houses of which are defendants in this lawsuit) replaced the court-ordered plan it was simply replacing a plan which it had originated.

#525 SIMILARITY OF THE 1983 DISTRICTS

525.11 Plaintiff contends (2855-56) at 3 Record 345:7-24 that according to Federal Practice and Procedure: "Passage of new legislation that does not satisfy the principles urged in attacking old legislation does not moot the attack. . . . Any other conclusion would have created a superb method for resistant legislatures to avoid Supreme Court review."

525.31 Plaintiff contends (2856-59) at 7 Record 338:4-339:14 that in United States v. W.T. Grant Co. the U.S. Supreme Court ruled: "In order to establish mootness the defendant who has discontinued challenged activities must carry a heavy burden of demonstrating that there is no reasonable expectation that the wrong will be repeated. Federal Practice and Procedure notes that even

then "Injunctive or declaratory relief may often be desirable to eliminate the present consequences of uncertainty, or to reduce the danger of recurrence."

525.51 (2859-2860) Plaintiff contends at 9 Record 1:2-15 that Legislature v. Deukmejian is simply the latest episode in a continuing conspiracy by Democratic officials in all branches of California government to force upon the people of California redistricting plans which are essentially the same as those which are the subject of Halliwell v. Eu. Substituting redistricting plans with minor modifications or using different tactics to impose these plans in no way deflects Plaintiff's challenge to the constitutionality of the districts at issue here.

525.71 (2860-64) Plaintiff contends at 13 Record 21:26-23:27 that since the new congressional districts are essentially unchanged from those in 1982 this court should follow the lead of the U.S. Supreme Court in American Party of Texas v. White: "Since it was a temporary measure [the challenged] legislation has expired [but] the new legislation is also comparable to its predecessor [and so] has not mooted this controversy. . . . In view of the special nature of election challenges in general and this short-term measure in particular, we proceed to evaluate appellants' claims on the merits."

525.72 (2864-65) Judges Kennedy, Karlton and Ramirez rule at 15 Record 199:17-22 in the Order of July 9, 1985 that plaintiff in this case seeks to invalidate the

court-ordered apportionment plan used in the 1982 congressional elections. Since the 1982 elections have passed and a new apportionment plan has been in effect since the 1984 elections it would appear that no relief can be granted to the Plaintiff which would redress his alleged injuries.

525.73 (2865-68) Plaintiff contends at 15 Record 232:2-233:21 that the entire Order of July 9, 1985 ignores the most fundamental aspect of any determination of mootness, whether the challenged activities have in fact ceased. The fact that the new districts perpetuate and indeed aggravate the flaws of the plan originally challenged has been documented by Plaintiff (the maximum population disparity has been doubled from 7,000 to 14,000). Federal Practice and Procedure notes: "Passage of new legislation

that does not satisfy the principles urged in attacking old legislation similarly does not moot the attack." In American Party of Texas v. White the U.S. Supreme Court ruled: "The new legislation is also comparable to its predecessor, [so the] recent amendments to the 1972 law have not mooted this controversy. In view of the special nature of election challenges in general and this short-term measure in particular, we proceed to evaluate appellants' claims on the merits."

525.74 (2868-69) Judges Kennedy, Karlton and Ramirez rule at 15 Record 201:7-12

in the Order of July 9, 1985 that in this case, the "capable of repetition, yet evading review" doctrine would apply if the challenged plan were still in force, but the election had already taken place. In such a case, the issues presented

would "persist as the [plan is] applied in future elections" (Storer v. Brown). As noted above, the matter at bar is not such a case, since the plan is no longer in operation.

525.75 (2869-2872) Plaintiff contends at 15 Record 233:23-235:11 that the cited portion of Storer rejects this court's position that facial alteration of the plan (by embodying very similar districts in new legislation) deflects a challenge to the underlying districts: "[adjudication] will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held." This doctrine is squarely applicable in the circumstances of an interim redistricting plan adopted when an election is close at hand. Moreover, even if there were no close similarity between

the districts now in use and those originally challenged by Plaintiff, Democratic Party of the United States v. Wisconsin squarely rejects mootness for even a one-election court order: "[E]ven if the order were clearly limited to the 1980 election year, the controversy would be properly before us as one 'capable of repetition, yet evading review.'"

525.77 (2872-73) Plaintiff contends at 15 Record 235:13-26 that NAACP v. Richmond speaks of "effects" and "alleged violation" which must continue to exist to avoid mootness -- not, as this court seeks to imply, of a requirement that the vehicle causing an injury must remain unchanged: "A case becomes moot when interim relief or events have eradicated the effects of the defendant's act or omission, and there is no reasonable expectation that the alleged violation will recur."

#527 CONTINUING EFFECTS OF THE 1982 ELECTIONS PRECLUDE MOOTNESS.

527.21 (2874-75) Plaintiff contends at 7 Record 337:6-19 that it is possible as of February 1983 that Plaintiff might be restricted by equitable considerations in terms of remedies that might be allowed, but his proposals for injunctions to require new elections clearly involve a live controversy and so are not mooted by the fact that the contested districts were used for the 1982 elections. Even should this proposal be rejected, a live issue would still remain in the potential use of replacement districts for any special elections that may be required in 1983 or 1984.

527.32 (2875) The Senate contends at 7 Record 390:4-6 that this court should dismiss this action with prejudice, as it is moot; this court

should no longer permit such abuse and misuse of the judicial branch.

527.41 (2875-2884) Plaintiff contends at 13 Record 220:22-224:27 that the Senate has been resolute in its efforts to avoid coming to grips with the misnumbering issue. The Senate's first line of defense has been an attempt to have the case declared moot even though Plaintiff challenges the seating of the extra senators from misnumbered districts and even though years remain in the terms of such senators.

527.51 (2884-85) Plaintiff contends at 13 Record 475:14-476:4 that even if the 1984 districts were free of the constitutional defects in their predecessors the advantage of incumbency gained from the 1982 elections precludes any finding of mootness regarding the 1982

districts. As the Supreme Court affirms in Stotts: "As long as the parties have a concrete interest in the outcome of the litigation, the case is not moot notwithstanding the size of the dispute. Powell v. McCormack 395 U.S. 486."

527.61 Plaintiff contends (2886-2890) at 13 Record 120:10-122:18 that even if all of Plaintiff's proposals for post-election relief from the unconstitutionality of the 1982 congressional districts are determined to be unduly disruptive the constitutionality of these districts will not be moot. For if the 1982 districts were constitutional, "preserving the cores of prior districts and avoiding contests between incumbent representatives" Karcher v. Daggett at 103 S.Ct. 2663 would be a valid justification for population disparities in the 1984 districts; but this would not be so if

the 1982 districts were unconstitutional.

527.73 Judges Kennedy, Karlton
(2891) and Ramirez rule
at 15 Record 199:25-200:4

in the Order of July 9, 1985 that the Plaintiff suggests that the Court could invalidate the 1982 election, and shorten the terms of Members of the United States House of Representatives who were elected under the challenged plan. This remedy is not available. Terms of Members of the House are two years in duration and therefore have already expired; there is nothing left to "shorten."

527.75 Judges Kennedy, Karlton
(2891-92) and Ramirez rule
at 15 Record 200:6-10

in the Order of July 9, 1985 that according to the Plaintiff, incumbents running in subsequent elections are designated as

such on the ballot. Plaintiff seeks to remove this designation from Members elected in the challenged election, seeking reelection. This remedy is also not available since the 1984 elections have already been held.

527.77 (2892-97) Plaintiff contends at 15 Record 241:2-243:15 that the advantage of being listed as an incumbent on the 1984 ballot helped to preserve the designation and will do so again in the 1986 election, so the effects of the unconstitutional elections continue. Moreover, any ruling that the 1982 districts were unconstitutional will affect any ruling on the constitutionality of the successor districts. The U.S. Supreme Court ruled in Karcher v. Daggett that modest population disparities may be justified in order to "preserve the cores of prior districts"; but this is so only

if the prior districts were constitutional.

527.79 (2897-98) Plaintiff contends at 15 Record 268:6-13 that even if all of Plaintiff's proposals for post-election relief from the unconstitutionality of the 1982 congressional districts are determined to be unduly disruptive the constitutionality of these districts will not be moot. For if the 1982 districts were constitutional, "preserving the cores of prior districts and avoiding contests between incumbent representatives" (Karcher v. Daggett) would be a valid justification for population disparities in the current districts; but this would not be so if the 1982 districts were unconstitutional. This same question of constitutionality of prior districts was a crucial factor in evaluating successor districts to those invalidated in

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Karcher v. Daggett in Daggett v. Kimmelman II.

#529 AN ISSUE CAPABLE OF REPETITION YET EVADING REVIEW

529.11 (2899) Plaintiff contends at 7 Record 337:20-338:3 that even if all injunctive relief should be denied a declaratory judgment would still be appropriate because the defects in the districts are clearly "capable of repetition yet evading review." Indeed, in elections cases a claim is rarely declared moot simply because the election already has been conducted.

529.22 (2900-2901) The Senate contends at 7 Record 387:27-388:18 that any question as to whether the California Supreme Court acted with purposeful discrimination, arbitrarily and capriciously, or in bad faith in adopting the 1982 districts is simply moot; the action in Assembly v. Deukmejian concerns and is explicitly limited to the 1982

elections only and so is not capable of repetition yet evading review.

529.31 Plaintiff contends
(2901-03) at 10 Record 70:4-72:3
that in Roe v. Wade the U.S. Supreme Court ruled that issues which by their nature must be resolved before the process of adjudication runs its course do not become moot if capable of repetition. Since this court has consumed more time in the process of adjudication than the time taken by the elections process itself, Wade v. Roe is clearly applicable.
Accord: 3 Record 346:2-347:24.

529.42 The Senate contends
(2903) at 6 Record 33:3-7
that Plaintiff's action is moot by virtue of the November 2, 1982 general election, as there will be new legislative and congressional districts for the 1984 elec-

tions and this action is not "capable of repetition, yet evading review."

529.52 The Senate contends
(2904) at 7 Record 20:14-26
that an action is not moot where the act which causes an alleged constitutional violation remains and controls future elections and the question raised is capable of repetition, yet evading review; however, this action is moot, as the California Supreme Court ordered the redistricting plans for the 1982 elections only and for no others.

529.61 Plaintiff contends
(2905-09) at 13 Record 23:28-25:28
that in Rosario v. Rockefeller the Supreme Court ruled: "Although the June primary election has been completed and the petitioners will be eligible to vote in the next scheduled New York primary, this case

is not moot, since the question the petitioners raise is 'capable of repetition, yet evading review.'" In Democratic Party of the United States v. Wisconsin the High Court ruled: "even if the order were clearly limited to the 1980 election year, the controversy would be properly before us as one 'capable of repetition, yet evading review.'"

529.71 (2909) Plaintiff contends at 13 Record 566:18-28 that the adoption of an interim redistricting plan for an election that is close at hand is precisely the sort of state action the constitutionality of which would in most instances be difficult to adjudicate before the election is conducted. Thus it is an issue which is clearly "capable of repetition yet evading review." See Roe v. Wade and United States v. W.T. Grant Co.

529.74 (2910-2911) Judges Kennedy, Karlton and Ramirez rule at 15 Record 200:15-26 that certain controversies are of such short duration that strict application of the mootness doctrine would prevent them ever from being brought to court for resolution, notwithstanding the injuries they cause. Such controversies are capable of repetition, yet they evade judicial review by virtue of their short duration. Controversies involving elections are often within this category.

529.75 (2911-2919) Plaintiff contends at 15 Record 247:21-251:24 that the very cases cited by this court affirm that the rights involved in elections cases are so fundamental that the usual prudential limitations on claims which may be adjudicated do not apply. Clearly cases involving political rights

cannot be left to be resolved by the political process. As the Fifth Circuit en banc notes in O'Hair v. White: "When a complaint alleges injury from a clogged democratic process, it would be anomalous to require the plaintiff to seek relief from political institutions."

529.77 (2919-2926) Plaintiff contends at 15 Record 244:2-247:20 that the possibility of repetition noted in this court's own citation of Nebraska Press Assn. v. Stuart on account of a possible reversal and a new trial closely resembles the situation in Halliwell v. Eu, as the current congressional districts are the subject of the ongoing Badham litigation and they could well be replaced by a court-ordered plan if found to be unconstitutional.

#584 COMITY WITH STATE JUDICIAL PROCEEDINGS

584.14 (3122) The Assembly contends at 3 Record 243:8-246:7 that comity requires that this Court defer to the California Supreme Court, as the U.S. Supreme Court has long recognized the importance of deference to state courts in dealing with matters of state reapportionment; even if this Court technically has jurisdiction, it should stay its hand.

584.17 (3122-3123) Plaintiff contends at 11 Record 469:23-470:11 that aggrieved parties have tried and failed to have the constitutionality of the contested districts adjudicated by California Courts. Comity therefore provides no reason for further delay in deciding the constitutionality of these districts. In Steffel v. Thompson the

U.S. Supreme Court observes: "[E]quality, comity and federalism have little force in the absence of a pending state proceeding."

584.18 (3124) The Assembly contends at 11 Record 37:6-11 that comity is not applicable here, since we are not talking about a situation where this Court should stay its hand to allow the California Supreme Court to do what it needs to do; this is clearly done.

584.32 (3124-25) Defendant contends at 12 Record 462:17-24 that where a state court adopts a legislature's redistricting plan as an emergency resolution of a reapportionment dispute, basic considerations of federalism and comity require that the federal courts accord proper respect to the decisions of the state court; law and

equity therefore require that Plaintiff's complaint be dismissed.

584.52 (3125-27) Judge Karlton rules at 4 Record 53:22-54:12 that little need be said regarding the Defendants' contention that "as a matter of comity, abstention, equity and federalism, this court should refuse to refuse to review Plaintiff's complaint". In the case at bar there are no pending or anticipated state proceedings that will dispose of the matters in issue, so there is no proper basis for abstention. As for comity and federalism, those doctrines do not permit this court to reject out-of-hand a constitutional challenge to a state court-ordered reapportionment plan.

#585 DISTRICT-COURT REVIEW OF STATE-COURT-MANDATED REDISTRICTING PLANS

585.14 (3128) The Senate contends at 3 Record 21:18-24 that it is the equitable and judicial action of the California Supreme Court which Plaintiff seeks this Court to enjoin and naught else; this United States District Court should not be used as a forum to appeal decisions of the California Supreme Court, nor should these decisions be collaterally attacked here.

585.15 (3128-3131) Plaintiff contends at 9 Record 6:2-7:10 that in Priesler v. Secretary of State of Missouri the Federal District Court overturned the decision of the Missouri Supreme Court in Priesler v. Hearnes, noting: "[T]his Three-Judge United States District Court is placed in the judicial-

ly-unenviable role of reviewing a decision of the highest court of the State of Missouri without previous review thereof by the Supreme Court of the United States . . . . [However] Wesberry v. Sanders teaches that apportionment is void when . . . there has been inadequate consideration to equality in population as between districts in the same state."

585.18 (3131-32) Defendant contends at 3 Record 222:11-18 that the substance of what Plaintiff is seeking is for this Court to review the decision of the California Supreme Court in its order for temporary reapportionment plans for the 1982 primary and general election; this Court should not be used as a forum to appeal decisions of the California Supreme Court but should restrain itself from this proceeding on the bases of comity and ab-

stention.

585.31 (3132-33) Plaintiff contends at 10 Record 103:12-22 that in Scott v. Germano the U.S. Supreme Court ruled that the Federal District Court could determine the validity of any redistricting plan adopted by Illinois state agencies, including its supreme court, and that if no valid plan had been adopted by a reasonable deadline set by the district court, the federal court could adopt its own reapportionment plan.

585.41 (3133-35) Plaintiff contends at 11 Record 93:24-97:13 that while the U.S. Supreme Court has encouraged state courts to assume responsibility for redistricting when a state's political branches of government fail to properly discharge this responsibility and the principle of comity requires lower

federal courts to move with circumspection in challenging the actions of state supreme courts, lower federal courts have rejected redistricting plans approved by a state supreme court.

585.51 (3136) Plaintiff contends at 11 Record 425:8-20 that although Judge Karlton ruled out enforcement of anti-gerrymandering standards for court-ordered plans since there is "no reason why this court should treat the California Supreme Court as if it were an inferior federal court," federal courts are indeed of superior status in relation to state courts under the provisions of Article VI § 2 of the U.S. Constitution. This is affirmed by the Texas Supreme Court, which notes in Upham v. White: "The Supremacy Clause makes the order of [a three-judge U.S. District] court binding on state courts."

#613 NEED FOR JOINDER OF
CALIFORNIA SUPREME COURT

613.15 Plaintiff contends
(3274-78) at 12 Record 4:20-6:26 that the interest of the California Supreme Court in the outcome of Halliwell v. Eu is unique, for a finding by this Court or by the U.S. Supreme Court that the Guaranty Clause has been violated by the California Supreme Court will severely damage the reputations of those Justices whose actions are thus branded as unconstitutional. Therefore participation here by the California Court will assure that concrete adverseness which illuminates difficult constitutional questions.

613.26 Defendant contends
(3278-3281) at 13 Record 543:20-545:9 that Plaintiff seeks to join as party defendant "the California Supreme Court

as represented by Chief Justice Bird," but the State Court plays no role in the allocation of population among districts, as the federal courts have authority to measure state reapportionment plans against federal standards whether the plans originate in the state legislature or the courts; therefore Plaintiff's joinder motion should be denied.

613.31 (3282-84) Plaintiff contends at 13 Record 565:13-566:16 that the Secretary of State argues that the California Supreme Court should not be joined as a defendant because the California Court played no role relevant to population disparities among the contested districts. However, this court has explicitly noted the responsibility of the California Court in this area and declined to grant injunctive relief because "at least at this stage in the proceedings

we must give some deference to the findings of the California Supreme Court."

613.41 (3284-86) Plaintiff contends at 13 Record 567:27-568:23 that the circumstances in this case are far different than when a state court has ruled on the constitutionality of the action of some other agency of state government. The California Supreme Court is the logical defender of the districts which the Court adopted as its own plan, especially since crucial aspects of the process by which the contested districts were selected are known only to the California Court. Thus joinder should be allowed and the California Court should be made to respond to formal inquiries.

613.54 (3286-87) The Assembly contends at 13 Record 490:23-491:14 that Plaintiff's motion to join the Cali-

fornia Supreme Court as a defendant is largely premised on a Guaranty Clause claim already dismissed by this Court, but Plaintiff's unhappiness with decisions of the California Supreme Court is no basis for permitting joinder; the California Supreme Court is no more a proper party here than this Court will be when Mr. Halliwell takes his case to the Hague.

613.55 (3288-89) Plaintiff contends at 13 Record 571:7-572:5 that where allegations of grave abuse of power are involved, accountability is as important in the judicial as in the executive branch. Joinder of the California Supreme Court is appropriate for the same reason given at the Watergate hearings in connection with President Nixon's abuse of power: "If there be no accountability the next president may feel free to do as he chooses, and next time there may be no

watchman in the night."

#631 DOCUMENTATION OF ASSEMBLY DISTRICT POPULATIONS

631.11 Plaintiff contends (3469-3470) at 4 Record 7:28-8:16 that at the June 11, 1982 hearing Assembly counsel quoted Plaintiff's inclusive complaint, "One district is more than 3% underpopulated and another is 3% overpopulated," in support of his contention that the population disparities in the Assembly plan were too small to violate equal protection requirements. However, the figures cited are minimum population disparities based on assumptions that subsequent events have shown to be untrue, but the Assembly treats them as maximum.

631.19 Plaintiff contends (3470-73) at 4 Record 6:4-7:27 that the 7% assembly district population disparity cited in footnote 21 of Assembly v. Deukmejian is based on generous

assumptions regarding the intent of the authors of A.B. 300 which never materialized in the revisions that were actually made to the districts. Instead the authors of A.B. 300 took advantage of the technical corrections process to secure additional political advantages.

631.23 Plaintiff contends
(3474) at 4 Record 14:16-23
that if Assembly counsel can demonstrate that his population figures are correct or if the figures are not correct but the Assembly and the Secretary of State are willing to make the corrections needed to bring the maximum and average population deviations down to the levels which are found in the Assembly's declarations, Plaintiff will stipulate that these revised districts adequately satisfy state and federal population equality requirements.

631.31 (3474-76) Plaintiff contends at 6 Record 21:14-22:5 that because of the unresolved complications produced by the huge number of "technical corrections" to the Assembly districts, verifying the population claims of the proponents of these districts is an impossible task without a specific listing of all the census population units in each district. Plaintiff has pointed to discrepancies between assembly district populations calculated by the Rose Institute and the official figures released by the Assembly; these contradictions cannot be resolved without population subtotals which the Assembly refuses to provide.

631.41 (3476-79) Plaintiff contends at 8 Record 165:6-166:24 that assembly population figures are probably erroneous because the districts were drawn using precincts to maximize

the accuracy in determining the political complexion of districts. This drastically increases the potential for error because divided census units may be partially lost tract of. The Assembly's computers probably compute the figures alleged by the Assembly, but the Assembly has made it impossible to evaluate the accuracy of the data base used in these computations.

631.56 (3479-3481) The Assembly contends at 8 Record 308:16-309:6 that the argument that the Assembly's population figures are probably inaccurate amounts to nothing more than speculation, since Mr. Halliwell provides no evidence that the use of precincts as building blocks has caused population to be lost track of; Plaintiff's analysis alleging congressional district population errors is no valid basis for speculating that

assembly populations are untrustworthy.

631.61 (3481-83) Plaintiff contends at 13 Record 479:11-480:12 that even if the California Supreme Court had duly authorized the Secretary of State to implement revised versions of 85% of the assembly districts mandated by Assembly v. Deukmejian the Assembly has not provided any intelligible description of these revised districts, much less proven what the populations of these districts are.

631.71 (3483-85) Plaintiff contends at 13 Record 148:4-149:2 that the Assembly has never directly challenged the validity of Dr. T. Anthony Quinn's figures for the A.B. 300 assembly districts which are found in Exhibit C-2 of Plaintiff's original complaint. After correcting typographical errors in A.B.

300 where legislative intent can be determined from the descriptions of other districts the 10.11% population disparity noted by Dr. Quinn is reduced only slightly to 10.07%.

631.75 (3485-87) Plaintiff contends at 15 Record 268:19-29 that the Assembly submitted no census data of any kind supporting its alleged populations and provided no subtotals which might have allowed verification of its figures. The Assembly's only statement on the methods used for population computations notes that populations used for split enumeration districts "are inherently somewhat imprecise" but that these units cannot be reunited "without upsetting the balance of population equality."

#633 VALIDITY OF STATISTICAL CLAIMS BY THE ASSEMBLY

633.11 (3488) Plaintiff contends at 4 Record 10:26-11:8 that because the Assembly has never provided a population listing by census units it is impossible to check the accuracy of Mr. Remcho's population figures. However, a check of the populations of the 35 cities which the proponents of A.B. 300 admit to splitting against the language of A.B. 300 and the Assembly's corrections list reveals gross inaccuracies and distortions which cast grave doubt on the reliability of the rest of Mr. Remcho's statistical analysis.

633.21 (3489-3490) Plaintiff contends at 4 Record 11:12-12:21 that according to the Assembly's affidavits, "As corrected, A.B. 300 contains only 23 significant city splits, with 35

in all." However, there are at least 9 city splits which the Assembly does not acknowledge, and seven cities which are supposedly split insignificantly have a total population of 70,335 sliced off by assembly district lines.

633.31 (3490-91) Plaintiff contends at 4 Record 12:22-13:6 that whether Assembly counsel is unaware of the number and magnitude of the city splits provided for by his revised version of A.B. 300 is unclear. However, the very misleading nature of the comments on city splits in his brief certainly undermines the credibility of the unverifiable district populations which are also included in the same February 25, 1982 brief.

633.33 (3491-92) Plaintiff contends at 4 Record 13:24-14:11

that Richard Nixon's attorney probably was sincere in the statements he made concerning the veracity of the excerpts of the Nixon tapes which he provided, but history has shown that these excerpts were grossly misleading. It is very difficult for someone in the position of Assembly counsel to provide more reliable information than is provided to him by his client. Therefore Plaintiff cannot accept as valid counsel's undocumented assertions unless and until counsel can persuade his client to stop stonewalling Plaintiff's legitimate requests for assembly district information.

633.42 (3492-95) Judge Karlton rules at 4 Record 62:13-31 that at oral argument Plaintiff stipulated that he had no "one person, one vote" claim against the Assembly, but he subsequently filed papers seeking to

withdraw that stipulation on grounds that information received at the hearing from the Assembly does not appear to be correct. Judge Karlton is satisfied that the stipulation offered by Mr. Halliwell was due to inadvertence, and since the Assembly was not prejudiced by its offer and subsequent withdrawal he has relieved Plaintiff of the stipulation.

633.56 (3495-96) The Assembly contends at 8 Record 8:19-9:13 that because the 1982 election is over, the population of the assembly districts used in it is a matter of historical fact that cannot genuinely be disputed; the maximum range of variation is 3.92%, with a ratio of largest to smallest district of 1.005:1, a mean deviation from the ideal of -.05% and a median deviation of -.22%.

633.61 (3496-3502) Plaintiff contends at 8 Record 169:18-172:6 that even though the Assembly is now moving for a summary judgment it has never sought to rebut any of Plaintiff's criticisms of its own statistics. Instead the Assembly has taken the position that the accuracy of its population figures no longer matters. However, it is universally accepted that passage of new legislation which does not eliminate previously existing constitutional flaws does not in any way deflect a legal attack on these continuing flaws.

633.71 (3502-06) Plaintiff contends at 8 Record 172:9-174:12 that in Assembly v. Deukmejian proponents of the congressional plan submitted an affidavit very similar in its lack of documentation to the Assembly's district-population affidavit submitted in Halli-

well v. Eu. When the Rose Institute challenged the accuracy of congressional population figures proponents submitted a census population breakdown which Plaintiff used to show that congressional population disparities were 20 times larger than proponents claimed. This is why the Assembly has refused to supply subtotals needed to verify its population claims.

633.86 (3506-3510) The Assembly contends at 8 Record 310:2-311:26 that even viewed from Mr. Halliwell's perspective, the assembly population variances do not create a prima facie violation of the Equal Protection Clause; Plaintiff contends that Assembly districts have a mean deviation from the ideal of 0.99% and a median deviation of 1.02%, but in Gaffney v. Cummings mean and median deviations of 1.8% and 1.9% were found to be constitutional.

633.89 Plaintiff contends
(3510-15) at 11 Record 534:23-536:26 that it is worth noting that the same Assembly brief which misstates the mean deviation, median deviation and population ratio ridicules Plaintiff's skepticism about the validity of the Assembly's population claims as being based on "not one shred of evidence." If anything at all was learned from the discrepancy between the transcripts of the tape recordings provided under sworn affidavit and the actual recorded conversations among the conspirators in the Watergate episode, it is that in a conspiracy case no court should trust indirect evidence when those charged with complicity in the conspiracy have direct evidence which they refuse to provide.

#854 JURISDICTIONAL STATUS OF PLAINTIFF'S APPEALS

854.22 (5384) The Senate contends at 13 Record 206:25-207:7 that pursuant to Rule 14.2 of the U.S. Supreme Court, the appeal taken by Plaintiff from the order of March 27, 1984, noticed by Plaintiff on April 16, 1984, is subject to dismissal on the ground that more than sixty days have elapsed since notice of appeal was filed; the Senate therefore moves this Court for an order dismissing Plaintiff's appeal with such costs as may be just.

854.27 (5385-88) Plaintiff contends at 13 Record 273:2-274:20 that Plaintiff's appeal from the aspects of the Order of March 27, 1984 noted in his April 16, 1984 notice of appeal has been greatly delayed by the process of transcript preparation for the February

16, 1983 hearing on senate district misnumbering. However, this transcript is now available and Plaintiff has been informed that the Court of Appeals has been notified and that "they will be notifying you when your briefing schedule is due."

854.31 (5388-5391) Plaintiff contends at 13 Record 473:5-474:21 that the Assembly asserts the notion that a litigant has a choice between appealing to the Ninth Circuit or to the U.S. Supreme Court. Plaintiff has set forth in his notices of appeal his own opinion as to the proper avenues for appeal for various aspects of the Order of March 27, 1984, but it now appears that the Ninth Circuit feels that any appeal should go to the U.S. Supreme Court, while Plaintiff's motion to the U.S. Supreme Court to affirm this has been denied.

#861 OCTOBER 27, 1982 APPLICATION TO JUSTICE REHNQUIST

861.11 (5392-93) Plaintiff contends at 5 Record 486:7-13 that because the three-judge panel reversed its decision and scheduled its first hearing after Plaintiff filed notice of his intention to request an injunction from the Supreme Court, this request will be submitted only after that hearing. To facilitate the emergency consideration this request will require, Plaintiff encloses advance copies of materials which summarize the basis for his proposed injunction.

861.21 (5393) Plaintiff contends at 5 Record 254:5-16 that on October 27, 1982 Plaintiff filed with the U.S. Supreme Court and the parties to this action a document labelled "SUMMARY OF MAJOR CLAIMS of Plaintiff in

Halliwell v. Eu -- Advance Copy -- Formal motion to be filed after District Court hearing on October 27, 1982."

861.31 (5393-94) Plaintiff contends at 11 Record 241:20-27 that when Plaintiff called Francis J. Lorson, Chief Deputy Clerk of the U.S. Supreme Court, just before the close of business in Washington, D.C. on Monday, November 1, 1982, Mr. Lorson informed him that Justice Rehnquist, acting the previous Friday on Plaintiff's written proposal, had denied the request for an injunction to halt California's congressional and state legislative elections which Plaintiff had withdrawn at the October 27, 1982 hearing.

861.41 (5394-5401) Plaintiff contends at 11 Record 239:19-242:24 that since the Court had not ruled on the

motion actually presented by Plaintiff at the October 27, 1982 hearing and since "ordinarily an appellate court does not give consideration to issues not raised below," Plaintiff sought a ruling from this court on November 1, 1982 so he could appeal to the U.S. Supreme Court. Since this court had expressed concern that any pre-election modification in the electoral process "would create sufficient confusion as to discourage many voters from going to the polls at all," Plaintiff modified his proposal to simply embargo release of election returns until the Court had decided how to validate or invalidate results from each district.

861.52 (5401) Chief Deputy Clerk Lorson notes at 5 Record 493:12-15 that Plaintiff's application for injunction has been presented to Justice Rehnquist, who has endorsed thereon the following: "Denied W.H.R. 10-29-82."

#864 FEBRUARY AND MARCH 1984 MOTIONS TO JUSTICE REHNQUIST

864.21 (5433-34) Plaintiff contends at 12 Record 37:22-38:17 that some guidance to Plaintiff as authorized by Haines v. Kerner is requested regarding the proper time frame for filing an appeal in these circumstances. Also, if Plaintiff complies with all court rules regarding the content of briefs, may he file a motion and supporting briefs regarding those aspects of the case requiring urgent consideration because of the elections calendar under the provisions of Rule 39 allowing typewritten papers rather than under the Rule 33 format for printed documents?

864.31 (5434-36) Plaintiff contends at 12 Record 167:19-168:14 that the District Court has not taken even the initial steps toward an adjudication of the merits of Plaintiff's constitu-

tional claims. Plaintiff therefore requests Supreme Court action to ensure compilation of a proper factual record, to establish a specific time frame for the consideration of long-pending proposals for injunctive relief, and to restore public confidence in the political even-handedness of the judicial process.

864.41 (5436-5440) Plaintiff contends at 12 Record 169:2-170:29 that the possibility of an adverse decision has generally been sufficient to persuade the parties in federal lawsuits "[to] sharpen the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." However, two years of inaction by the District Court has caused Defendants to conclude that they need not be concerned about such a possibility, and they have not responded to Plaintiff's

allegations and continue to withhold essential information.

864.51 (5441-49) Plaintiff contends at 12 Record 171:2-175:9 that the refusal of the District Court to even consider Plaintiff's motions for injunctive relief relating to the 1982 elections for more than 8 months prior to the elections, its refusal to rule on revised proposals for post-election relief for nearly 1½ years after the elections, and its refusal to even allow briefing on motions for injunctive relief relating to the 1984 elections is obviously not a proper interim disposition in light of the expedited consideration requirement of 28 U.S.C. § 2284.

#866 REFUSAL OF CLERKS TO TRANSMIT PLAINTIFF'S APPLICATIONS

866.11 (5450-51) Plaintiff contends at 12 Record 167:4-19 that on January 27, 1984 and again on February 14, 1984 Plaintiff made application to the Circuit Justice for the Ninth Circuit seeking enforcement of the expedited consideration requirement of 28 U.S.C. § 2284, but in both instances deputy clerks refused to transmit these applications to Justice Rehnquist. Because of the ongoing elections process leading to June primaries in California and the continuing refusal of the District Court to act at all, corrective action to enforce procedural requirements for statewide redistricting cases is now a matter of utmost urgency.

866.17 (5451-54) Plaintiff contends at 12 Record 189:4-190:8

that the Supreme Court has the authority to intervene at once in Halliwell v. Eu, a politically sensitive constitutional challenge to California's congressional and state legislative redistricting plans upon which the lower court has avoided adjudication while state elections have come and gone and now approach again. Misapplication of the Rules of the Supreme Court has led to wrongful refusal of court clerks to transmit Plaintiff's two prior applications seeking enforcement of procedures applicable to voting rights cases.

866.23 (5454-5466) Plaintiff contends at 12 Record 202:4-208:13 that thus far in the processing of Plaintiff's applications there appears to have been little thought given to the effect on the voting rights of the people of California of a refusal to transmit to

Justice Rehnquist detailed evidence that the rules governing statewide redistricting cases "have been practically nullified by a District Judge [and] by a concert of action on the part of several District Judges." See Los Angeles Brush Mfg. v. James.

866.29 (5466-5481) Plaintiff contends at 12 Record 209:2-215:29 that when Plaintiff made his first application to Justice Rehnquist on January 27, 1984 the process leading to the nomination and election of California's congressional and state legislative representatives had not yet commenced. Six weeks later this process is well underway, and further delay on account of refusal by law clerks to promptly transmit the accompanying application to Justice Rehnquist as required by Rule 43.1 can only compound the miscarriage of justice

already caused by delays in this case.

866.35 (5481-5501) Plaintiff contends at 12 Record 216:4-225:28 that surely the modest burden of retaining this case record until the issue of injunctive relief relating to the 1984 elections is decided is not excessive in view of the special circumstances of this case, a statewide redistricting case filed on Feburary 19, 1982 and not yet adjudicated by the lower court more than two years and one full elections cycle later.

866.41 (5501-04) Plaintiff contends at 12 Record 226:4-227:16 that in view of the ongoing elections process in California "it is too late in the day and entirely contrary to the spirit of the Federal Rules" for court clerks to take further action which

prevents Plaintiff's applications to Justice Rehnquist from being promptly transmitted to the Justice and thereby causes "[a] decision on the merits to be avoided on the basis of mere technicalities." See Foman v. Davis 371 U.S. at 181-182.

866.47 (5504-5512) Plaintiff contends at 12 Record 290:4-293:29 that Rule 44.1 provides that "a writ on injunction may be granted by any Justice in a case where it might be granted by the Court." Since Plaintiff's allegations of a widespread pattern of refusal to enforce federal statutes protecting voting rights involve judges of the Ninth Circuit Justice Rehnquist's familiarity with the judges in his circuit makes it especially appropriate that an application be directed to Justice Rehnquist.

866.53 (5512-5520) Plaintiff contends at 12 Record 397:14-399:22 that even a cursory inspection of Plaintiff's submission of April 7, 1984 reveals that it is not any sort of application for a stay or injunction, but a motion to the Court to ensure than an application to an individual Justice which is to be submitted later will be promptly transmitted to the Justice concerned. Since Plaintiff submitted 40 copies of this motion and it was shorter than 5 pages and it did not fall within any of the categories where Rule 33 is applicable there seems to be no basis for its rejection.

866.59 (5520-24) Plaintiff contends at 12 Record 438:6-439:8 that Mr. Lorson stated that if an appellant were not satisfied with Mr. Lorson's interpretation of Court Rules appellant

should appeal to the Clerk of the Court. Since Plaintiff believes that Mr. Lorson's interpretations are contrary to both the intent and the literal meaning of the Rules of the Court and since actions of deputy clerks contrary to the plain terms of these Rules have had a devastating impace upon Plaintiff's ability to secure timely consideration of his case, Plaintiff is making that appeal to the Court Clerk in the enclosed memorandum.

866.65 (5524-27) Plaintiff contends at 12 Record 443:3-444:18 that Mr. Lorson told Plaintiff with great feeling: "Do you realize what would happen if we wasted the time of the Justices with motions like yours? We would be fired, do you understand me? Fired!" If clerks may actually be fired for wasting the Justices' time by forwarding motions as provided by Rules 43.1 and 43.2, clerks

will inevitably err on the side of exclusion, since that will ensure that the Justices never see the meritorious motions that the clerks have wrongfully excluded. A harsh employment policy of this sort would vitiate the liberal spirit of the Rules themselves.

866.71 (5527-5535) Plaintiff contends at 12 Record 444:19-448:20 that Plaintiff has provided evidence of massive resistance to the enforcement of federal protection for political rights in support of the appropriateness of a single-Justice writ of mandamus. It is true that all courts are more reluctant to issue mandatory injunctions than prohibitory injunctions and that the few writs of mandamus that have been recently issued were by the full Court, but the plain terms of Rule 44.1, "a writ of injunction may be granted by a Justice in a

case where it might be granted by the Court," do not make an exception for mandatory injunctions.

866.77 Plaintiff contends (5535-5540) at 12 Record 448:21-450:25 that Plaintiff included as part of his application of March 20, 1984 a document entitled, "Memorandum Regarding Refusal of Court Clerks to Transmit Plaintiff's Applications to Justice Rehnquist Pursuant to Rule 43," but court clerks refused to transmit this application. Plaintiff was concerned that Ms. Downs would again intercept any application containing this same information and therefore filed a preliminary motion to make certain that his next application would be promptly transmitted to Justice Rehnquist as Rule 43.1 requires.

866.83 Plaintiff contends
(5540-44) at 12 Record 451:2-452:29
that court clerks have violated the plain terms of Rule 43.1 in refusing to transmit applications seeking relief from systematic violation of the political rights of Republicans by judges of the Ninth Circuit. Whether or not Justice Rehnquist sees any need for intervention in Halliwell v. Eu in the present circumstances, court clerks certainly have no authority to prevent Justice Rehnquist from learning of these circumstances.

866.89 Plaintiff contends
(5544-5561) at 13 Record 75:3-83:23
that a principal factor in the refusal of clerks of the U.S. Supreme Court to transmit Plaintiff-Appellant's motions of January 27, February 14, March 20 and April 7, 1984 has been an insistence that an individual Justice has no authority to

issue an extraordinary writ pursuant to 28 U.S.C. § 1651(a). However, in Leonard v. Wolff Justice Rehnquist affirms his own "obligation to act as surrogate for the entire Court in deciding to grant or deny extraordinary relief pursuant to 28 U.S.C. § 1651."

#867 APPLICATIONS TO JUSTICE REHNQUIST IN MAY AND JUNE 1984

867.11 (5562-65) Plaintiff contends at 13 Record 64:3-65:21 that the letter of Assistant Clerk Downs states that Plaintiff's motions referred to Justice Rehnquist on May 7, 1984 were treated as requests for injunctive relief and denied on this basis. However, neither motion requested the issuance of any injunction; they only sought to remove obstacles to the prospective exercise of the Court's jurisdiction over an appeal that will be forthcoming as soon as the court reporter completes preparation of an essential hearing transcript.

867.21 (5565-67) Plaintiff contends at 13 Record 203:6-21 that the treatment of two procedural motions as if they were an application for an injunction, followed by refusal to

forward an application designed to untangle the resulting confusion, leaves Halliwell v. Eu in limbo, since the requests of the Ninth Circuit and the Eastern District of California for jurisdictional clarification from the Supreme Court remain unanswered. Plaintiff therefore submits a renewed request for clarification, updated to reflect the current circumstances of the case.

867.31 (5567-5570) Plaintiff contends at 13 Record 202:6-26 that Clerk Downs refused to transmit Plaintiff's May 21, 1984 request for clarification of Justice Rehnquist's ruling of May 7, 1984 on the grounds that "It is not the practice of Justices of this Court to issue clarifications regarding rulings on applications to individual Justices." But since the May 7 ruling treated motions which were not a request

for an injunction as if they were, the parties to Halliwell v. Eu, the District Court, and the Ninth Circuit are left bewildered.

#014 ASSEMBLY DISTRICT POPULATION DISPARITIES

014.11 Plaintiff argued on February 19, 1982 at 1 Record 13:

"The Assembly districts in A.B. 300 contain so many drafting errors that meaningful analysis of population equality and contiguity is very difficult."

014.21 Plaintiff contends at 1 Record 131-132:

"[Percentage] deviations from the ideal population are larger for assembly districts than for senate districts. Only 1/3 of these districts are within the [Reinecke IV 10 Cal.3d 396] 1% tolerance, [four] districts are [more than] 2% . . . underpopulated . . . [or] overpopulated. [These are illegal according to Reinecke IV under any circumstances.] No justifications are given for any of the 2/3 of all districts with population disparities

which would require explanation under previously applied standards."

014.31 Plaintiff contends at 4 Record 70-71:

"While it remains unclear what the Assembly districts are, certain population characteristics are apparent. For example, the majority opinion in Assembly v. Deukmejian (1982) 30 Cal.3d 638, 666 note 21 admits that the maximum population disparity for uncorrected assembly districts may be 15%. The court orders no corrections for these districts . . . . Even according to the unverifiable population claims put forward by proponents of the assembly plan, more than half violate the 1% maximum deviation from the ideal population which is applicable under pendent jurisdiction over state law. No justification is offered for any of these deviations."

014.42 Assembly counsel argued at the October 27, 1982 hearing at 11 Record 222-223:

"The only evidence of record now before this court on the question of the Assembly Districts is the Affidavit of James Tucker filed yesterday which points out that the maximum deviation in the State of California Assembly districts is 3.92 percent."

014.44 The Assembly contends at 5 Record 463-464:

"The standard for reapportionments involving state representative districts such as the Assembly is that the districts be 'as nearly of equal population as practicable.' Mahan v. Howell, 410 U.S. 315 (1973).

"As the Exhibit to the Declaration of James Tucker demonstrates, the population of every Assembly district is within 2% of the ideal. The total range of

deviation is 3.92%, with the smallest district (AD 56) being 1.98% smaller than the ideal and the largest being 1.94% greater than the ideal. Id."

014.46 The Assembly contends at 8 Record 9: "As the percentage figures contained [at 5 Record 472-473] of the Tucker Declaration show, the population of every Assembly district used in November 1982 was within 2% of the ideal. The smallest district (AD 56) is 1.98% smaller than the ideal, and the largest (AD 51) is 1.94% larger than the ideal. Id. The maximum range of variation is thus 3.92%, with a ratio of largest to smallest district of 1.005.1. The mean deviation from the ideal is -.05%, and the median deviation is -.22%."

014.47 Plaintiff contends at 8 Record 173:

"At [8 Record 9] lines 11-13 of its Points

and Authorities the Assembly claims that the ratio of largest to smallest district is 1.005:1, the mean deviation is -.05% and the median deviation is -.22% . . . . The [actual] ratio between [largest and smallest claimed Assembly district] populations is 1.040:1, not 1.005:1; thus the relative population disparity is understated by a factor of eight. The mean deviation from the ideal for the populations alleged [by the Assembly] is 0.99%, not -.05%; thus the Assembly is off by a factor of twenty in this calculation . . . . When the median is properly calculated according to size of deviation it is 1.02%, or nearly five times as large [as claimed by the Assembly]."

014.48 The Assembly contends at 8 Record 310-311:

"Plaintiff argues that percentage deviations from the ideal are larger than those

stated at [8 Record 9] of the Assembly's Memorandum in support of its motion. Without commenting on or conceding the accuracy of the numbers derived by Mr. Halliwell, we note that even his figures do not amount to a prima facie case of constitutional violation. Plaintiff contends that the Assembly districts have a mean deviation from the ideal of 0.99% and a median deviation of 1.02%. . . .

"Mr. Halliwell also challenges the Assembly's ratio of largest to smallest district, claiming correctly that the ratio is 1.04 to 1. A computational error resulted in the 1.005:1 ratio set out at [8 Record 9] of the Assembly's Memorandum in support of its motion for summary judgment. The Assembly apologizes to the Court and the Plaintiff for the error."

014.61 Plaintiff contends at 10 Record 202-204:

"The Assembly's last line of defense for its claimed population disparities is that 'interim plans are subject to less stringent equal protection standards than those controlling regular reapportionment plans. See Reynolds v. Sims, supra, 377 U.S. at 585.' 8 Record 12. This rationale will not support the constitutionality of the Assembly plan because standards for interim plans are relaxed only to the degree required by practical necessity. In Upham & Clifford v. Seamon (1982) 456 U.S. 37, 44 the U.S. Supreme Court notes:

> 'It is true that we have authorized District Courts to order or to permit elections to be held pursuant to apportionment plans that do not in all respects measure up to the legal requirements, even constitutional requirements. See, e.g., Bullock v. Weiser, 404 U.S. 1063, 92 S.Ct. 750, 30 L.Ed.

2d 752 (1972); Whitcomb v. Chavis, 396 U.S. 1055, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1970). Necessity has been the motivating factor in these situations.'

There was no necessity for the California Supreme Court to adopt an assembly plan with population disparities as large as those in A.B. 300, since at least three alternate plans with smaller population disparities had been provided to the Legislature before the Legislature enacted its own plan: Halliwell Assembly Plan #1, Minority Assembly Plan #1, and Minority Assembly Plan #2. All of these plans were filed with the California Supreme Court in Assembly v. Deukmejian. See 5 Record 297-364. Dr. Halliwell's assembly plan had a maximum population disparity (between 59 AD = 298,763 and 22 AD = 292,690) of 6,073, see 1 Record 268, whereas the Assembly claims a maximum

population disparity (between 51 AD = 301,601 and 56 AD = 290,005) of 11,596, see 8 Record 46. Plaintiff's assembly plan was also superior to A.B. 300 in compliance with all other constitutional criteria. See 1 Record 97-189. Furthermore, as late as April 14, 1982 it would have been possible to reduce the population disparity in the Assembly's plan and improve compliance with all other constitutional requirements by means of Plaintiff's revisions based on whole precinct swaps. See 2 Record 66-170."

014.71 Plaintiff argued on June 9, 1984 at 13 Record 149-155:

"The Assembly has sought to evade judicial enforcement of one-man-one-vote requirements applicable to state legislative districts by making unverifiable claims about a poorly defined version of the districts which has no legal status.

"The defense provided by the Assembly against allegations that the 1982 assembly plan violates one person, one vote requirements has been to divert attention from the districts adopted in Assembly v. Deukmejian to another set of districts which allegedly comply with population equality standards. The Assembly has taken care to present the crucial premises which supposedly justify this substitution in its rebuttal of May 23, 1983 [at 8 Record 304-312] so that Plaintiff would have no opportunity to call the court's attention to the Assembly's sleight-of-hand tricks.

"This subterfuge might have been noticed by this court if the Assembly had filed with this court a complete copy of the brief supporting its technical corrections which it filed with the California Supreme Court; but the crucial first two pages of the California Supreme Court

brief were excised from that document before it was given to this court. These two pages are provided [at 13 Record 175-176].

"These missing two pages demonstrate that (1) these corrections were submitted as a 'supplemental appendix' a week after the final deadline for submissions by the parties; (2) these corrections were not completed til long after the legislation had been passed and were not based on maps on which the Legislature may have relied in adopting A.B. 300; and (3) the corrections are different from those used by Republican analysts when they calculated the maximum population disparity which is cited in Assembly v. Deukmejian. For reasons which will be explained below, these constitute the reasons why neither the Legislature nor the California Supreme Court has authorized the revised version of the assembly

districts which the Assembly is trying to defend.

"The Assembly's May 23, 1983 reply to Plaintiff's opposition to summary judgment declares: 'The corrections of technical errors were both statutority authorized, see Cal.Elec.Code § 30000, and presented to and accepted by the California Supreme Court . . . .' 8 Record 310. However:

1) The fact that these 'technical corrections' are included in a supplemental appendix filed more than a week after the December 31, 1981 submissions deadline makes it unlikely that the California court took any greater cognizance of it than this court did of Plaintiff's 'Supplemental Memorandum on Standing,' which was also filed out of season.

2) A.B. 300 (including § 30000) was signed by Governor Brown on September 17,

1981. Since proceedings in Assembly v. Deukmejian were initiated in October of 1981 and the Quinn declarations being rebutted in the Assembly's submission of January 8, 1982 were filed in November and December of 1981, it is obvious that the maps which allegedly authorized the Tucker corrections were not maps which had been prepared by the Legislature in connection with the enactment of A.B. 300 in September 1981 but were still in preparation months later; as the Assembly notes in the deleted pages 1 and 2 of its submission of January 8, 1982,

> 'The declaration of T. Anthony Quinn purports to authenticate a computer printout obtained from the Secretary of State. . . .
>
> 'The printout obtained by real parties was a preliminary list of corrections. Had real parties

inquired, they would have learned that the corrections were being made on maps, as provided for in A.B. 300, and that the printout they obtained was not a final list of corrections, but simply a working document forwarded to the Secretary of State for her comment and review. As the third declaration of James R. Tucker (filed herewith) states, final maps as well as a final list of corrections have now been provided to the Secretary of State.'

But according to § 30000,

'Any maps describing the boundaries of the districts, as contained in this division, which have been prepared by the Legislature or a committee of the Legislature in connection with the enactment of this division may be

deposited with the Secretary of State in order to illustrate the boundary lines set forth in this division.' Emphasis added.

§ 30000 does not authorize post-enactment corrections contrary to the language of the bill, as Assembly has repeatedly tried to suggest.

3) The fact that the corrections which are the basis for the Quinn population figures are different from those contained in the third Tucker declaration, in the January 8, 1982 submission to the California Supreme Court, is documented with respect to key districts [at 13 Record 194-196, in] the accompanying declaration of Michael J. Halliwell. Therefore when the Assembly cites (at 8 Record 310) the concession noted in footnote 21 of Assembly v. Deukmejian, that 'the corrected districts are probably within 7 percent

of absolute equality,' it is citing a concession based on figures for a version of the assembly districts which have never been implemented, i.e., Quinn's assumptions based on a set of corrections the Assemb characterizes in the two deleted pages as 'a preliminary list.'

"While the 7% maximum population disparity cited in Assembly v. Deukmejian is clearly inapplicable to districts embodying the Tucker corrections, it is not possible to calculate the true population disparity in this version of the districts because of the obscure form in which the Tucker corrections are set forth and the failure of the Assembly to provide the maps which allegedly authorize these corrections. Even with the necessary maps it would be a formidable task to mesh Tucker's corrections with the legal descriptions of the 1982 assembly districts

which are available to the public; indeed, as Plaintiff noted at 1 Record 100-101 and 8 Record 165, errors of omission and double counting resulted when key maps were withheld from the Assembly's staff. This is why Plaintiff has requested supporting documentation for the Assembly's purported population figures before attempting to provide a specific refutation of them.

"On June 14, 1982 Plaintiff called attention to discrepancies between the Assembly populations attested to in the Quinn affidavit and those alleged by the Assembly and the need for subtotals for divided tracts to determine the true populations of these districts. See 4 Record 6-9. Also, in his May 9, 1983 opposition to the Assembly's motion for summary judgment Plaintiff noted that 'unless the Assembly is willing to provide a printout showing how it arrives at the populations

it uses for split census tracts it is impossible to evaluate the accuracy of the Assembly's data base.' 8 Record 155. But in its rebuttal the Assembly tries to create the impression that it has provided to Plaintiff the population data which he seeks or at least that the maps showing corrections to the 1982 districts and populations moved between districts in the corrections process are available to the general public:

> 'Plaintiff now has in his possession all information concerning the actual population used in California's 1982 Assembly elections. Declaration of Joseph Remcho, Paragraph 4. These materials were provided despite Plaintiff's continuing failure to submit discovery requests pursuant to the Federal Rules of Civil Procedure. Additional materials

> that plaintiff claims to need are public records that plaintiff for his own reasons chooses not to purchase or otherwise obtain.' 8 Record 309.

Plaintiff has been provided with no population data except the undocumented and unverifiable district populations in the Tucker declaration; and there is no public source for the information which the Assembly has refused to provide.

"In its December 31, 1981 brief filed with the California Supreme Court the Assembly had admitted, 'Some of the corrections, however, involve geographic areas too small to appear clearly on the maps furnished to the Secretary of State.' Id. at 43. Thus it would be difficult for plaintiff to analyze these changes using the smaller-scale census maps available to the general public. In the same brief the Assembly had conceded:

'In other cases, the errors resulted from inaccurate or illegible maps and print-outs prepared by the Census Bureau. There were 74 errors of this type, constituting 26.3% of the total.' Id. at 41. Plaintiff has previously complained (at 8 Record 164) of the difficult problems facing anyone attempting to analyze the revised version of the Assembly plan using census maps and raw population data.

"It is clear from the above that the Assembly realizes that its withholding of the details of its own population computations makes an accurate independent analysis of its districts impossible.

"Even though Plaintiff has been prevented from compiling his own figures for assembly district populations by the Assembly's refusal to provide data essential for this analysis, he has been able to point out flaws and deliberate distortions in the population data which the

Assembly has submitted. For example, in his opposition to summary judgment (at 8 Record 173) Plaintiff pointed out that the mean deviation from the ideal population was .05%, while the true value was almost 20 times larger. In its rebuttal (at 8 Record 310) the Assembly notes: 'Plaintiff contends that the Assembly districts have a mean deviation from the ideal of 0.99%'; the Assembly explicitly declines to comment on or concede the accuracy of Plaintiff's method of computation. However, on December 31, 1981 the Assembly had admitted in its brief to the California Supreme Court that 'The average absolute variance from the ideal Assembly district in A.B. 300 is .99%.' Id. at 58-59. It is plain that the Assembly was aware of the proper method for computing the average deviation and that its twentyfold understatement of this statistic to this court therefore was deliberate.

"Even if Plaintiff were somehow able to compute populations for assembly districts which incorporate the Tucker corrections and were to find serious errors in the Tucker population figures, proponents have left themselves an escape hatch which would preclude action against them under the penalty for perjury provisions of their supporting affidavits. Dr. Cain admits (at 8 Record 39) that population figures for some districts involve estimates which 'are inherently somewhat imprecise' and that census populations cannot be used in place of these estimates 'without upsetting the balance of population equality.'"

014.81 Plaintiff contends at 8 Record 530: "The three smallest [1983] assembly district populations, according to the Rose Institute, are 65 AD = 275,482, 50 AD = 285,186, and 58 AD = 287,907. The three

largest populations are 71 AD = 304,011, 51 AD = 301,650, and 17 AD = 301,369. The assembly district population disparity of 28,529 exceeds constitutional limitations, and the percentage disparity is larger than several which have been ruled unconstitutional even when they involve much smaller numbers of people."

#024 PRACTICAL NECESSITY OF USING THE LEGISLATURE'S PLANS

024.12a The Senate contends at 3 Record 22, 24:

"Plaintiff cannot [satisfy the standard set forth in] Wood v. Conneaut Lake Park Inc. (1967) 386 F.2d 121, 124-125 [which states,]

> 'Absent a showing of arbitrary or capricious action on the part of the state supreme court, no Fourteenth Amendment violation exists. Failing a prerequisite showing of arbitrary action by the state court, the district court was without original jurisdiction to entertain [Plaintiff's] suit.'"

024.12b Plaintiff replies to the Senate at 3 Record 292-293:

"There are several instances of arbitrary and capricious action on the part of the

California Supreme Court which taken together completely circumvented provisions of the California Constitution designed to restrict the gerrymandering of legislative districts. The majority opinion explicitly refused [at 30 Cal. 3d 666] to consider the constitutionality of the contested districts, and the majority also made clear [at 30 Cal. 3d 676] that they had no intention of doing so in the future:

> 'If the new districts are adopted and the referenda pass, there will be no disruption whatsoever . . . . The Legislature will have no need to take any further reapportionment action for the remainder of the decade.'

"However, simply refusing to enforce the provisions of Article XXI was not sufficient to ensure the effectuation of the Legislature's redistricting plans,

since the supporters of Article XXI swiftly gathered 2½ times the number of valid signatures needed to block the contested districts by referendum petition. Because of this successful petition drive it was necessary for the majority of the California High Court to also scuttle the referendum provisions of the California Constitution in order to put the Legislature's redistricting plans into effect. This action is absolutely contrary to the uniformly accepted interpretation . . . of clear and unambiguous language in the State Constitution, according to which the referendum reserves certain powers unto the people themselves. This power has been invoked to preclude not only A.B. 301, S.B. 99 and A.B. 300 but any redistricting plans not essentially different from those contained in these bills until and unless the people vote to approve them, and these powers reserved unto the

people themselves are denied to the courts as much as to the Legislature.

"Yet the effect of the January 28, 1982 ruling of the California Supreme Court is to turn referenda on legislative redistricting into advisory plebiscites devoid of practical significance. . . . Under the standard set forth by the majority opinion the Legislature can always stay one step ahead of the public and continue to gerrymander at will no matter how many voters sign referendum petitions and no matter how resoundingly the electorate rejects the Legislature's redistricting plans."

024.15 Plaintiff contends at 5 Record 226-227:

"The majority opinion in Deukmejian invokes compelling practical necessity, not state law, as justification for abrogating referendum provisions of the California

Constitution. But when faced with a situation similar to that in Assembly v. Deukmejian the District Court in Klahr v. Williams (1967) 289 F.Supp. 829 routinely upheld the right of referendum:

> 'It appearing to the Court that there were filed with the Secretary of State of the State of Arizona, within ninety days after the adjournment of the First Special Session, Twenty-eight Legislature, State of Arizona, referendum petitions against Chapter 1, Twenty-eight Legislature, First Special Session, bearing the signatures of qualified electors sufficient in number to require the submission of said Chapter 1 to the people of Arizona at the general election to be held in 1968, so that said Chapter 1 will not become law unless and until ap-

proved by a majority of the votes cast thereon at the 1968 General Election and upon proclamation of the Governor of Arizona; and good cause appearing therefore,

'It is ordered, adjudged, and decreed: . . . .

'That the Decree entered herein on February 2, 1966, Klahr v. Goddard, D.C., 250 F.Supp. 537, and the First and Second supplemental Decrees entered herein on March 14, 1966, 254 F.Supp. 997 and December 5, 1966, 289 F.Supp. 827, respectively, redistricting the Congressional districts of Arizona and reapportioning both Houses of the Arizona Legislature shall apply to and govern primary, general, and special elections which may be held hereafter until the legislative authority of the

State of Arizona shall have adopted different, valid, and effective plans for redistricting and reapportionment, or until the further order of the Court.' Id. at 829."

024.21 Plaintiff contends at 3 Record 213-215:

"The 'practical considerations' which are the lynchpin of the Supreme Court's decision are contrivances of those who seek to subvert constitutional safeguards against partisan gerrymandering. This 'run-out-the-clock' strategy was recognized from the outset by those who sought to preserve the public interest in fairly apportioned legislative districts. Plaintiff, the Rose Institute, the minority party and Hispanics seeking greater legislative representation all presented fully documented redistricting plans to

the Legislature before any of the official plans were unveiled. This did not prevent the Legislature from ignoring these plans, asserting that the various public interest objectives embodied in these plans were impossible to achieve, and stalling until the very end of the legislative session before passing their own plans.

"Within 48 hours of the release of each of the Legislature's redistricting plans the Rose Institute was able to analyze enough of each plan to demonstrate that it flagrantly violated constitutional requirements. This did not prevent the Supreme Court from ruling that it was too soon to consider the constitutionality of the Legislature's redistricting plans until the day it handed down its decision and announced that it was too late.

"The Secretary of State had available plans that were more practical in every way than those devised by the Legis-

lature, but this did not prevent her from ordering county registrars to implement the Legislature's plans on the grounds of practical necessity. Proponents of alternate redistricting plans further simplified them to keep them administratively feasible long after the registrars started 'gearing up' to use the Legislature's plans; the Supreme Court resolutely refused to consider evidence of their feasibility. When it in fact became too late to change redistricting plans before the June 1982 elections the Secretary of State was provided with thoroughly documented, cross-referenced and illustrated revisions of the Legislature's plans that would have removed most of their constitutional defects. These revisions could have been implemented without delaying the June primary, but the Secretary of State circumvented a proposed temporary restraining order that would have kept these options

open by issuing instructions to the county refistrars that foreclosed any changes in legislative district boundaries. This action was taken by the Secretary of State between the time she was informed of the proposed temporary restraining order and the time when the hearing on this proposal was scheduled.

"There is absolutely nothing that the opponents of the Legislature's redistricting plans could have done which they did not do to minimize the practical obstacles to using different legislative districts. Even so, the Supreme Court's majority has clung resolutely to its alleged 'practical obstacles' which 'obviate any possibility of giving consideration to alternate plans.'"

024.27 Plaintiff contends at 4 Record 198-200:

"The vehicle for this political usurpation

was the decision in Assembly v. Deukmejian (1982) 30 Cal.3d 638. This action was instituted in an attempt to invalidate referendum petitions which contained the authenticated signatures of 2½ times the necessary number of registered voters. The cause of action was the fact that signers of the petitions were asked to inscribe their address when last registered to vote rather than their current resident address. This challenge was utterly frivolous because 1) only a small percentage of the population had moved during the year since the 1980 presidential elections, when registrations were last purged, and many of these had re-registered at their new addresses; 2) the re-registration requirement exists only to ensure that voters will be properly qualified for district and local elections; where in the state a voter resides is inconsequential in relation to a state-

wide issue; 3) the form of the petitions with regard to the signer's address was identical to that used for every initiative or referendum petition in recent years. The Supreme Court nevertheless consumed 4½ months before rejecting this challenge to the validity of the referendum petitions. This delay, together with the fact that proponents of the contested districts waited until the last legal moment before approving them in the Legislature, left only one day before the 'must know' deadline for legislative district boundaries which had been established by the Secretary of State.

"In these circumstances the California Supreme Court ruled that there was no time to consider any of the alternative redistricting plans which had been submitted to the Court and that the only feasible means for conducting the 1982 legislative elections were the very districts

which had been blocked by referendum petitions. Yet according to the unambiguous wording of the California Constitution, the meaning of which is not disputed by Assembly v. Deukmejian or any other decision of the California Supreme Court, the people reserve 'unto themselves' the decision on enactment of any proposed legislation which has been stayed by referendum petition. Until the electorate has voted on such legislation neither it nor anything even similar may take effect.

"The only justification offered by the Court for the alleged feasibility monopoly of the districts which had been blocked by referendum was the computer programming for the contested districts which the Secretary of State had ordered county registrars to undertake while the Court was considering the validity of the petitions filed against these districts. The Secretary of State has no legal

authority to order such preparations. The Secretary of State's justification for this action was that any delay in elections preparations would incur 'the extraordinary cost of adding staff to cut production time.' In selecting the redistricting plans supported by her own political party the Secretary of State picked the least constitutional of all the available plans; moreover, even at the time the Court's decision was handed down many of the alternative plans were still administratively feasible because they were much less complicated than the plans proposed by the Legislature. Even had the alternative plans been equally complicated and therefore required the same amount of computer programming any of them could still have been used if the Court had been willing to incur the cost of $1.09 per voter that would have been necessary for a special election for legislative contests."

024.33 Plaintiff contends at 9 Record 14-18:

"Not only is a direct tax on voting unconstitutional, so is any fiscal policy which burdens this precious right. [Supporting quotations from Bullock v. Carter (1972) 405 U.S. 134, 148-149 and Dunn v. Blumstein (1972) 405 U.S. 330, 366 at 9 Record 14.]

"In short, while the prevailing philosophy of the High Court accords broad latitude to the states in many areas, its decisions unequivocally recognize that federal protection for political rights is an essential ingredient of viable federalism. [Supporting quotations from Kusper v. Pontikes (1973) 414 U.S. 51, 56-59 and Cousins v. Wigoda (1975) 419 U. S. 477, 487 at 9 Record 15-18.]"

024.39 Plaintiff contends at 7 Record 286-288:

"The majority opinion of Chief Justice Bird and her Brown-appointed colleagues disregards a number of key facts in their search for some plausible rationale for ignoring constitutional requirements and mandating the use of blatantly partisan gerrymanders of California's congressional and state legislative districts:

1) Only five months remained before the June primary because the Legislature used up the entire 1981 session of the Legislature in devising redistricting plans and the State Supreme Court took 4½ more months in deciding to reject a challenge to the validity of referendum petitions filed against these plans. In a 1982 special session when partisan advantage could be gained by speed rather than delay, the Legislature devised three 'essentially different' redistricting plans in less than three weeks. The challenge to

the validity of referendum petitions was utterly frivolous, as the petitions complied with every requirement that had been applied to prior petitions and contained 2½ times the required number of validated signatures. When the Reinecke I Court considered the previously unadjudicated issue of the powers of the state reapportionment commission it took less than ¼ as long to reach a decision. As the Assembly has noted (1 Record 207-208):

> 'The urgency of these matters is best illustrated by the speed with which the Court moved in Reinecke I [6 Cal.3d 602]. The docket shows that the petition was filed on December 15, 1971. The alternative writ was issued on December 20, 1971. And the case was decided on January 18, 1972, in an order effective immediately."

2) The two to four months of computer programming was ordered without statutory authority by Democratic Secretary of State March Fong Eu. The Secretary of State needed 'some way' to conduct the 1982 elections and so selected districts whose use was proscribed under Article II §§ 9-10 and Article XXI of the California Constitution in preference to numerous redistricting plans (5 Record 297-362) which were vastly superior in constitutional compliance and administrative feasibility.

3) In spite of the advantage of two to four months of implementation the Legislature's redistricting plans still posed more administrative problems than the alternative redistricting plans devised by the Rose Institute and others because the districts in the alternative plans were consti-

tuted of whole counties, cities and census tracts.

4) Because the Thomas Brothers publish a road atlas which shows census tract boundaries for all the counties that are divided in the model plans which were available to the California Supreme Court and the Court was informed of this fact by proponents of these model plans, it should have been obvious that anyone who can locate his own residence on a map would have no difficulty in determining his district residence if the Court had honored Article II §§ 9-10 and Article XXI and adopted any of these model plans for interim use. On the other hand the vast number of split tracts, block groups and even split blocks in the Legislature's redistricting plans and the fact that the Legislature provided no legible maps for its districts

created a severe district identification problem that was in no way ameliorated by the computer programming in which the majority opinion placed such reliance.

5) The decisions of the United States Supreme Court most certainly do not hold that any practical alternative may be considered for adoption as a court-ordered plan regardless of constitutional considerations. In Carrington v. Rash (1965) 380 U.S. 89, 96 the Court explicitly ruled: 'We deal here with matters close to the clore of our constitutional system . . . . States may not casually [abridge voting rights] because of some remote administrative benefit to the State.'"

024.45 Plaintiff contends at 7 Record 289-291:

"[I]t is simply absurd to suppose that

with the resources available to it the California Supreme Court could not have devised redistricting plans both administratively and constitutionally superior to those adopted by the Legislature and blocked by referendum petition. In less than one month Plaintiff by himself, without any tools but census maps and a hand calculator, developed the package of revisions (2 Record 66-288) which accompanied his April 3, 1982 proposal for a temporary restraining order. The maps which were filed along with these proposed districts are more detailed than those provided by the Legislature for their districts, and the legal descriptions are more precise than those in the redistricting bills passed by the Legislature.

"It is equally ridiculous to suppose that because the Court could not do the thorough job done in devising the court-ordered districts adopted in 1974

it should therefore wash its hands of all responsibility for upholding the California State Constitution. Of course it would have taken the Court less time to choose from among the thoroughly documented plans submitted to it than to devise the Court's own plans.

"If the Court was sincere in its belief that there was a significant probability that the voters would adopt the Legislature's redistricting plans a special election could have been held any time up to two months before the June primary. If the Legislature's districts were voted up or down these districts or alternative districts designated by the Court could have been used for congressional and state legislative primaries held on June 8, 1982 with campaigns conducted according to ground rules used for special elections. It is true that it would have cost $12 million to hold a

pre-primary special election, but any doubts as to the proper balance between 'serious impact on the state treasury' and constitutionally conducted elections have been definitively resolved by the United States Supreme Court in Bullock v. Carter (1972) 405 U.S. 134, 148-149:

> 'Viewing the myriad governmental functions supported from general revenues, it is difficult to single out any of a higher order than the conduct of elections at all levels to bring forth those persons desired by their fellow citizens to govern. Without making light of the state's interest in husbanding its revenues, we fail to see such an element of necessity in the state's present means of financing primaries as to justify the resulting incursion on the prerogatives of voters.'"

024.53 Plaintiff contends at 5 Record 263-265:

"The time constraints under which the California Supreme Court operated were largely of the Court's own making, since the Court took nearly 4½ months from when redistricting bills were all finally passed (on the last day of the legislative session) until it handed down its decision (on a frivolous challenge to the referendum petitions) at the end of January 1982. That the Supreme Court could have acted in a much shorter time is best illustrated by a quotation (p. 33) from the Assembly's petition favoring the use of its redistricting plan for the 1982 elections:

> 'The urgency of these matters is best illustrated by the speed with which the Court moved in Reinecke (I). The docket shows that the petition was filed on December 15, 1971. The alterna-

tive writ was issued on December 20, 1971. And the case was decided on January 18, 1972, in an order effective immediately.'

The Court was assisted by the Rose Institute and others in various ways which would have expedited its development of its own redistricting plans, but the Court continued its passive approach to the case in spite of all such assistance.

"The collaborative effort to subvert the constitutional requirements for redistricting began with the Legislature, which consistently tried to minimize public scrutiny of its redistricting and thereby handicap efforts to enforce constitutional requirements. See 1 Record 100-104.

"The total result of these partisan redistricting maneuvers, in which even the Governor personally participated and which the State Supreme Court implicitly sanctioned, was delay which has made

judicial review as late and difficult to obtain as possible. In Ely v. Klahr (1971) 403 U.S. 108, 120 Justice Douglas warned against the possibility of a 'run-out-the-clock' strategy:

> 'A valid apportionment plan will seemingly mean the defeat of several incumbents. . . .
>
> '. . . The hearings on such a plan will doubtless be long drawn out and extensive. The prize is great, for if the present incumbents can prolong matters, the 1972 election may come and go with the existing invalid 1970 plan in effect.'

Justice Douglas probably never conceived of the possibility that a legislature operating in spectacularly open bad faith would be able to enlist the cooperation of a state supreme court in evading constitutional requirements; but Plaintiff

has alleged that appointees of Governor Brown, who constituted the majority of the California Supreme Court which ordered into effect the Legislature's redistricting plans, did so for transparent political motives. See 1 Record 228-231."

024.59 Plaintiff contends at 10 Record 139-141:

"Instead of making a good-faith effort to comply with constitutional requirements, the Legislature, the Secretary of State and the Chief Justice and other Jerry Brown-appointed members of the California Supreme Court conspired to force the use of the Legislature's redistricting plans on the grounds of practical necessity. (1) After keeping their redistricting plans secret for as long as possible, (2) proponents of the Legislature's plans mounted a frivolous challenge to the validity of the referendum petitions filed

against these plans. (3) While the California Supreme Court consumed 4½ months in reaching a decision on this frivolous challenge, (4) the Secretary of State ordered the county clerks to program computers to implement the Legislature's plans.

"The Secretary of State had no authority to order such computer programming -- especially since the districts she ordered implemented had been blocked by referendum petitions with 2½ times the necessary number of valid signatures; moreover, the districts obviously were flagrantly in violation of the geographic integrity requirements of Article XXI and were so horrendously complicated that (according to Assistant Chief Deputy Registrar of Los Angeles County Richard Siler) they placed 'absolutely critical' strains on the processes of election administration. Furthermore, at the time the Secre-

tary of State ordered the computer programming for the Legislature's redistricting plans she could have chosen to begin implementing several alternate plans which already had been presented to the Legislature and which were superior in constitutional compliance, legal status and administrative feasibility. See 5 Record 297-364, 384-388.

"When the California Supreme Court decided Assembly v. Deukmejian on January 28, 1982 there still was plenty of time to program computers to use any of the model plans which consisted largely of whole counties, cities and census tracts; there was even enough time for the Court to draft its own plan if single-office paper ballots were used for the 1982 congressional and state legislative primary elections. However, the California Supreme Court resolutely refused to consider evidence submitted to it concerning the

unconstitutionality of the Legislature's plans and the feasibility of alternate plans. Instead it invoked the illegal preprogramming ordered by the Secretary of State as a 'compelling reason' why the Legislature's plans must be used for the 1982 elections. The California Supreme Court refused to make any modifications to improve constitutional compliance in the Legislature's plans. Undoing the mis-numbering of senate districts would have required only a stroke of a pen, but this also would have undone a major built-in advantage for the Democratic Party.

"Even if there had been a real administrative advantage in using the Legislature's redistricting plans, administrative efficiency is no valid excuse for impairing, much less abrogating, vital political rights. [Quotation at 10 Record 141 from Gould v. Grubb (1975) 14 Cal.3d 661, 675 ruling out similar 'administra-

tive efficiency' interests as a basis for infringement upon political rights]."

024.67 Plaintiff contends at 4 Record 201-202:

"What has happened as a result of Assembly v. Deukmejian is a plain and unambiguous usurpation of power. The California Supreme Court did not and could not question the clear meaning of the restrictions against legislative gerrymandering in Article XXI; the Court simply refused to enforce them. Above and beyond the intrinsic constitutional defects of the Legislature's redistricting plans is the fact that all three plans have been duly and resoundingly rejected by the voters of California; the validity of this action must be and is recognized by the California Supreme Court. The Court cited many legal reasons why the 1982 elections must be conducted in districts reapportioned

according to the 1980 census, but it did not and could not cite any legal reason for using the Legislature's redistricting plans; this aspect of the majority opinion in Assembly v. Deukmejian is supported only by the Court's 'equitable discretion.' The 'compelling practical necessity' cited by the Court as the rationale for its ordering into effect the Legislature's plans arises from three circumstances: 1) the Legislature waited until the last legal moment before sending its redistricting plans to the Governor for his signature. 2) The Legislature then consumed an additional 4½ months with a frivolous challenge to the validity of the referendum petitions filed against each of their redistricting plans. 3) While the Legislature was running out the clock the Secretary of State ordered county registrars to make advance preparations to use the Legislature's redistricting plans so that

by the time the Court ruled it was 'too late to consider use' of any of the alternative redistricting plans.

"That the controlling majority of the California Supreme Court (all of whom were appointed by Governor Jerry Brown) could have been innocent pawns of the 'run-out-the-clock' strategy used to force adoption of three highly partisan and blatantly unconstitutional redistricting plans strains credulity. However, if such had been the case the Court should at least answered the pleas for reconsideration or otherwise clarified its reasoning. The resolution of this case must depend on the legal validity of what the Court has done, not speculation about underlying motives; but the obvious possibility of shared political motivation tantamount to collusion is relevant to this case because expedited consideration is essential to restoring public confidence in the integ-

rity of the political process in California."

024.75 Plaintiff summarizes "Severe Violations of Established Constitutional Norms in the Adoption of the 1982 Congressional Districts" at 13 Record 9-10:

"(1) Deliberate manipulation of legislative, judicial and administrative processes to force the use of the contested districts. (a) The State Legislature delayed enactment of its redistricting plans until the very end of the legislative session and kept the plans secret until enactment in order to hinder challenges to the constitutionality of these districts. The plans were signed by the Governor without publicity in the dead of night in order to hamper a referendum challenge to the use of these districts in the coming elections. (b) The Califor-

nia Supreme Court stalled for 4 months, then ruled that the districts blocked by valid referendum petitions and challenged as unconstitutional must be used for the 1982 elections since there was no time to implement any of the alternative redistricting plans (see 5 Record 297-364, 384-389) submitted to the Legislature and to the Court. Deliberate abuse of its equitable discretion by the California Supreme Court in order to secure partisan advantage is analyzed at 3 Record 162-220, 5 Record 260-266, 7 Record 285-299, and 10 Record 136-140. The refusal of any of the Defendants to respond to Plaintiff's allegations regarding deliberate obstruction of justice by the California Supreme Court and this Court's refusal to allow joinder of the California Supreme Court makes it wholly inappropriate to accord any deference to the actions of the California Court in adopting the contested

districts. (c) Violations of due process of law in the implementation of the contested districts by the Secretary of State are analyzed at 1 Record 189-203 and 10 Record 147-163. At no point in these proceedings has Defendant responded to Plaintiff's allegations regarding her own illegal manipulation of the elections process to secure advantages for Democratic candidates.

"(2) Abridgement of Political Rights in Order to Avoid the Cost of Constitutionally Conducted Elections. In Bullock v. Carter (1972) 405 U.S. 134, 147-148 the U.S. Supreme Court ruled: '[I]t is difficult to single out any [governmental function] of a higher order than the conduct of elections. . . . Without making light of the state's interest in husbanding its revenues, we fail to see [how financial considerations can] justify [an] incursion on the preroga-

tives of voters.' Nevertheless the Secretary of State ruled out the use of constitutionally adequate redistricting plans to save 'the extraordinarily high cost of adding staff to cut production time' (2 Record 15), and the California Supreme Court eliminated the constitutionally required statewide vote before use of districts challenged by referendum petition to save the $12 million cost of a special election (see Assembly v. Deukmejian (1982) 30 Cal.3d 638, 658)."

024.83 Plaintiff argued on May 26, 1984 at 13 Record 122-123:

"Unless the 1982 congressional districts are found to be constitutional, their use must be justified by proving administrative necessity.

"The constitutionality of the contested congressional districts is the most important factor in determining whether

the California Supreme Court abused its equitable discretion in ordering the use of these districts for the 1982 elections. If the population disparities in these districts cannot satisfy the strict population equality requirements of Article I § 2 then Plaintiff is entitled to post-election relief unless bona fide administrative considerations precluded the use of constitutional congressional districts for the 1982 elections.

"Thus unless the 1982 districts are found to be constitutional Defendant bears the burden of proving that the use of the Burton Plan was actually compelled by administrative necessity. Plaintiff has documented the fact that alternative redistricting plans with smaller population disparities and superior compliance with all other constitutional requirements were available at the time when the Secretary of State ordered county registrars

to begin computer pre-programming for the districts in the Buton Plan. Plaintiff has demonstrated that alternative plans consisting of compact groupings of whole counties, cities and census tracts could still have been used for the 1982 elections at the time the Burton Plan was adopted by the California Supreme Court since they did not require the extensive computer programming needed for the horrendously fragmented components of the Burton Plan."

#027 DEFECTIVE MODE OF ENACTMENT OF THE 1983 REDISTRICTING PLANS

027.11 Plaintiff argued on December 10, 1982 at 6 Record 57:

"If indeed an extraordinary occasion exists (as required by Article IV Section 3b of the California Constitution) requiring the Legislature to adopt redistricting legislation at a special session such necessity must give way before Plaintiff's showing of the extraordinary damage that such an action would inflict on the integrity of California's political process. This damage would arise because the Legislature which has been called into special session and which immediately voted to abolish established legislative procedures has not been constitutionally elected."

027.15 Plaintiff contends at 11 Record 289-292:

"[The order of February 8, 1983 notes]: 'Plaintiff requests this Court to enjoin the Legislature of the State of California from adopting redistricting plans for use in the 1984 elections before the Governor-elect is sworn into office on January 3, 1983.' (7 Record 525.)

"The basis for this request is the clearly illegal nature of the special session on redistricting. Article IV § 3(b) of the California Constitution provides:

> 'On extraordinary occasions the Governor by proclamation may cause the Legislature to assemble in special session. When so assembled it has power to legislate only on subjects specified in the proclamation but may provide for expenses and other matters incidental to the session.'

"As the Order of February 8

appears to recognize, the period of time from December 6, 1982 until January 3, 1983 is not an 'extraordinary occasion' requiring the enactment of redistricting plans for use in the 1984 elections. The special session on redistricting obviously was called to evade the mandate of the 1982 elections wherein the Democratic Party lost control of the Governor's Office. It cannot have been the intent of the people of California in adopting Article IV § 3(b) to allow their authority to be thus circumvented. Moreover, Article II § 1 of the California Constitution declares, 'All political power is inherent in the people.' Lame-duck officeholders who have been rejected by the people should not be permitted to usurp the rightful functions of those selected by the people to govern them on account of a nonexistent extraordinary occasion. Furthermore, Article

I § 3 of the California Constitution affirms: 'The people have the right to instruct their representatives.' The demonstrable purpose of the special session on redistricting was to evade the instructions given by the people in the redistricting referenda of June 1982.

"Given the stark clarity of the state law in question, Davis v. Mann (1964) 377 U.S. 678,690 was clearly applicable to the circumstances:

> 'Where the federal court's jurisdiction is properly invoked and the relevant state constitutional and statutory provisions are plain and unambiguous there is no necessity for the federal court to abstain pending determination of state law questions in a state court . . . .'

"Since all the actions of a de facto legislature are generally accepted

as valid even if that legislature is later found not to have been constitutionally constituted, the refusal of this panel to adjudicate plaintiff's challenge to the legality of Governor Brown's proclamation of a special session on redistricting until after that session had enacted redistricting legislation may well have inflicted an irreparable injury on this aspect of plaintiff's case.

"The Order of February 8 continues:

> 'We must assume at this point that if the Legislature adopts a redistricting plan it will do so in a manner consistent with the order of the California Supreme Court in Assembly v. Deukmejian, 30 Cal.3d 638, cert. denied sub nom. Republican National Committee v. Burton ___U.S.___102

S.Ct. 2003 (1982).' (7 Record 525.)

"Assembly v. Deukmejian at 678 did indeed mandate that any new redistricting plans enacted following rejection of the Legislature's 1981 plans must be 'essentially different' from the rejected plans. Given the strong precedents in support of this position it would have been difficult to justify any other ruling on this point. However, any legislature elected from the rejected districts would have a vital stake in perpetuating districts which are essentially the same; and if the members of this panel really believed that the Legislature would give priority to their oaths to uphold the Constitution over political self-preservation, they were alone among observers of the reapportionment scene in this belief. Furthermore, Kramer v. Union School

District (1969) 395 U.S. 621, 628 notes: 'The presumption of constitutionality [is not applicable] when the challenge to the statute [argues] that the institutions of state government are [not] structured so as to represent fairly all the people.' In Halliwell v. Eu it is not merely arguable that the Legislature does not fairly represent the views of the people of California on reapportionment, the referenda of June 1982 have proven that this is so."

027.25 Plaintiff contends at 8 Record 538-539:

"Because none of the challenges to the legality of the Legislature's 1981 redistricting plans was adjudicated on the merits due to blatant disregard of established binding judicial procedures by state and federal judges who owe their careers to Jerry Brown and Alan Cranston,

illegally elected state senators and assemblymen were able to cement themselves into office with new districts tailored to maximize their advantage over potential opponents.

"In order to secure the 2/3 vote needed to prevent a referendum challenge to the Legislature's new redistricting plan, flagrantly unconstitutional alternative plans were circulated which threatened reprisals against legislators who were opposed to the inclusion of an urgency clause in the new redistricting legislation."

027.35 Plaintiff contends at 11 Record 286-287:

"Almost immediately upon being sworn into office, members of the Legislature elected from the districts rejected in the June 1982 referenda, with the aid of lame-duck Governor Jerry Brown, took bold

steps to evade the mandate of the referenda and cement themselves into office for the remainder of the decade. On December 10, 1982 plaintiff filed an emergency request for an injunction and motion to shorten time (6 Record 47-80) to safeguard the political rights of Californians from an illegally elected legislature operating under a suspension of normal rules at an illegally called special session.

"The clear and present danger to the legitimacy of California's political institutions in these circumstances was palpable. With the two extra senators elected prematurely from 6 SD and 32 SD playing a key role, the leadership of the Senate had issued a 'surrender or die' edict in the form of punitive redistricting proposals that threatened to unseat senators who refused to support an urgency clause which would block any

referendum challenge to the Legislature's plan for perpetuating itself in office. In the Assembly there were no disenfranchised or doubly represented districts, but in this chamber political blackmail in the form of punitive redistricting proposals was also employed to force support of an urgency clause. The extra leverage in the Assembly came from a rules change that allowed a bare majority to take instant action on legislation without observing rules requiring printed bills, consideration by committees, etc.; the Assembly even brushed aside the requirement of Article IV § 8(b) of the California Constitution requiring readings on three separate days for the passage of bills."

027.45 Plaintiff inquired of the Assembly on July 2, 1984 at 13 Record 307: "Does the Assembly admit that when

Republican analysts used the computer facility provided to them to generate documentation for legal challenges to the Legislature's redistricting plans, access to this facility was terminated by order of the Speaker?"

027.65 Plaintiff contends at 10 Record 142-143:

"The process of enactment of the Legislature's 1983 redistricting plans involved a different set of violations of the State and Federal Constitutions. The foremost of these is the shielding of the districts from repeal by means of the initiative. See plaintiff's brief of November 1, 1983 [9 Record 1-454] concerning the action of the California Supreme Court in Legislature v. Deukmejian. Violations at prior stages in the enactment process include the calling of an illegal special session on

redistricting by lame-duck Governor Jerry Brown and procedural irregularities which played a key part in the passage of the redistricting plans enacted at that session. See 8 Record 538-541.

"Plaintiff's warning (4 Record 75) that if the double representation in the 1982 senate plan were allowed to become a reality the senators from the double-represented districts would play a decisive role in determining the next redistricting plan has been borne out by events. In exchange for creating winnable districts for both of the senators representing 6 S.D. and the prematurely elected senators in 12 S.D. and 32 S.D., Senators Doolittle, L. Greene, McCorquodale and Royce cast the decisive votes which prevented a referendum challenge to the 1983 senate redistricting plan. See Senate Journal of December 28, 1982

(First Extraordinary Session) pp. 111-112. The fact that the double representation of these districts made passage of the 1983 plan by a bare majority a foregone conclusion was used as leverage to force other senators to support an urgency clause or risk losing their seats. See [10 Record 356-357]."

027.75 Plaintiff contends at 10 Record 145-146:

"Aside from being enacted by an illegally constituted legislature at an illegally called special session, the Legislature's A.B. 2X 1983 congressional plan was enacted by means of an illegal procedural maneuver [which violated] Article IV, Section 8(b) of the California Constitution, [which] requires three readings on three separate days to enact any bill unless this requirement is dispensed with by a two-

thirds majority." [See supporting documentation at 10 Record 146].

#028 UNAUTHORIZED REVISIONS TO THE 1982 DISTRICTS

028.11 Plaintiff contends at 1 Record 192:

"The 22 AD must have been thrown together just as the redistricting bill was being printed, and some of the partial tracts don't even list blocks in numerical order. This district represents a bold new advance in reapportionment thinking: pass a thumbnail sketch of a district, then fill in the details after the Legislature has voted. There are 42 changes for this one district in the Secretary of State's corrections list."

028.22 The Assembly contends at 8 Record 308:

"[Plaintiff] provides no evidence of error. Errors in the plan were corrected. The California Supreme Court ordered use of the Legislature's plans as corrected.

See Assembly v. Deukmejian, 30 Cal.3d 638, 666, n. 22."

028.25 Plaintiff contends at 4 Record 76: "Assembly plan proponents submitted a list of 277 corrections to the California Supreme Court one day before the oral hearing on Assembly v. Deukmejian. There is no support in the Supreme Court's decision for the Secretary of State's contention that the Court intended to adopt these corrections. The corrections which are mentioned in the Court's opinion are those which had been put forward by Republican analysts as 'the most charitable interpretation of ambiguous language in A.B. 300.' The unauthorized corrections proposed after passage of A.B. 300 by the Assembly Elections and Reapportionment Committee flagrantly violate applicable state standards. Cf. Silver v. Brown II (1965) 63 Cal.2d 841. Also, there are

strong federal void-for-vagueness restrictions which are applicable where abridgements of federally protected rights are concerned."

028.29 Plaintiff contends at 4 Record 9-10:

"According to Mr. Remcho the Secretary of State assumed that the Supreme Court meant to adopt A.B. 300 districts as modified by the 277 corrections which were filed with the Court on January 8, 1982 even though the Court never referred to them in its majority opinion; and this was the version of the assembly plan which was in fact implemented. Mr. Remcho provides population figures for these Assembly districts which incorporate his list of 277 corrections and were implemented by the Secretary of State.

"However, Mr. Remcho admits that additional errors beyond the 277 listed

in his January 8, 1982 brief have since been found. These errors will certainly affect the accuracy of the population figures claimed in Mr. Remcho's briefs and may affect contiguity as well."

028.33 Plaintiff contends at 4 Record 298-299:

"Plaintiff has not alleged, as counsel for the Assembly and Secretary of State 'admit,' that the California Supreme Court adopted a 'corrected' version of any of the redistricting plans. The majority opinion makes no mention whatever of the list of 277 corrections which Mr. Remcho filed on the day preceding the oral hearing in Assembly v. Deukmejian. Since the Court referred only to the enacting legislation, only typographical or other textually demonstrable errors may be corrected, as per the procedures set forth in Silver v. Brown (II) (1965) 63 Cal.2d

841. This requirement creates no problems for the Senate plan, leaves several congressional districts inadequately defined and renders the poorly drafted Assembly plan without any valid authorization."

028.37 Plaintiff contends at 8 Record 163-165:

"ILLEGAL CHANGES WERE MADE BY THE ASSEMBLY AND THE SECRETARY OF STATE TO THE REDISTRICTING PLAN AUTHORIZED BY THE CALIFORNIA LEGISLATURE.

"Apparently the Assembly gave up any effort to prove that districts set forth in A.B. 300 and adopted by the California Supreme Court do satisfy population equality requirements and sought to preclude a challenge in federal court to the validity of the 1982 Assembly elections by instead using another set of districts with

277 changes from the districts set forth in A.B. 300. In aiding and abetting this switch of districts the Secretary of State completely ignored legal procedures for correcting flaws in legislative districts as set forth in Silver v. Brown II (1965) 63 Cal. 2d 841. This switch operation took place in the following manner: when, shortly before passage of A.B. 300, it became apparent to the bill's proponents that their districts were a chaotic mess, language was inserted into the bill providing that the districts be described by maps as well as by the listing of district components. These maps were not shown to members of the Assembly outside the inner circle before A.B. 300 was enacted, not shown to members of the Senate when A.B. 300 was acted upon by that body, and not shown to the California Supreme Court before A.B. 300 was adopted as a

court-ordered plan for the 1982 Assembly elections. After the Assembly, Senate and California Supreme Court had approved the districts in A.B. 300 the maps were changed and then used as evidence of legislative intent to justify the 277 changes.

"Shortly before filing this suit plaintiff discussed the authority for making these changes with Anthony Miller, Chief Counsel for the Secretary of State. Mr. Miller stated that since he couldn't read minds he was accepting any change that the Assembly elections and reapportionment committee claimed were intended by the proponents of A.B. 300. Since filing this suit plaintiff has repeatedly and without success sought some justification from the Secretary of State for her carte-blanche corrections policy.

"To analyze all 277 changes in

the A.B. 300 districts plaintiff would have to purchase maps showing California census units down to the block level. Due to the availability of census tract road atlases published by Thomas Brothers plaintiff has been able to analyze those changes involving whole census tracts. See 1 Record 189-195. This analysis pinpoints numerous changes that are inconsistent with the ostensible rationales set forth in item 8 of the declaration of Dr. Bruce Cain; and although this analysis has been part of the case record for more than a year its accuracy has never been challenged by the Assembly even though the Assembly is now moving for a summary judgment. Plaintiff also has clearly demonstrated the partisan advantage derived from many of the changes which he has analyzed, and the political impact of illegally switching people

between districts is not trivial; it is the same as if that number of people had received ballots to which they were not entitled.

"The Order of April 19, 1983 excludes only partisan advantage gained by legal means as a cognizable grievance. Thus whether or not the Court should find for the Assembly on the issue of population disparities, the Secretary of State and the Assembly still must defend the legality of changes made in the A.B. 300 districts which are contrary to the language and demonstrable intent of that bill."

028.42 The Assembly contends at 8 Record 310:

"The corrections of technical errors were both statutorily authorized, see Cal. Elec. Code § 30000, and presented to and accepted by the California Supreme

Court, see Declaration of Joseph Remcho in support of Assembly's Motion for Summary Judgment and attachments thereto [8 Record 17-48]."

028.43 Plaintiff contends at 10 Record 164-165:

"In 8 Record 310 n.6 the Assembly alleges that correction of technical errors in the 1981 redistricting plan adopted by the Legislature were statutorily authorized by Cal. Elec. Code § 30000. In fact § 30000 was blocked by referendum petitions in 1981 and rejected by the electorate in 1982 and enacted in 1983 only when it was included in Chapter 1 of S.B. 3X. The Assembly does not explain how 1983 legislation can authorize corrections implemented in 1981 and 1982 without violating the ban on ex post facto laws of Article I § 10 of the U.S.

Constitution.

"Even had § 30000 been in effect in 1981 and 1982 it would not have been applicable. The Legislature did not provide the Secretary of State with maps which had been prepared by the Legislature in connection with the enactment of its redistricting plans. Instead, after passage of its redistricting plans the leadership of the Assembly tried to remedy as many of the constitutional violations pointed out in legal challenges to its redistricting plans as it could without making politically unpalatable changes in the districts. Many changes had to be made in adjoining districts to avoid aggravating population disparities that were already far greater than the Reinecke IV standard; and these 'ripple-effect' changes were always made in the way which produced the best political

result, regardless of the original provisions of A.B. 300. Maps were then prepared to reflect these 'technical corrections' and these maps were substituted for those used in connection with the enactment of A.B. 300.

"Moreover, even had the proper maps been provided to the Secretary of State they could only have been used to interpret ambiguous language in A.B. 300, not to amend portions of the bill where there was no conflict between different provisions and the meaning of the descriptions of districts was clear."

028.47 Plaintiff summarized, on June 9, 1984, the "ABSENCE OF LEGAL AUTHORITY FOR THE '277 TECHNICAL CORRECTIONS' TO A.B. 300 DISTRICTS" at 13 Record 197-199:

"In the portion [see 13 Record 175-176]

of an Assembly v. Deukmejian filing which originally accompanied the Tucker and Cain declarations but was not provided to this court Ms. Johansen accuses Dr. Quinn of exaggerating the number of post-adoption modifications to A.B. 300 by 'count[ing] separately all of the changes necessary to correct a single error.' The nature of this dispute may be illustrated in terms of the 'four' corrections to 22 AD noted by the Third Declaration of James R. Tucker (see 8 Record 57-59). Correction #41 revises the district boundary by changes involving Tracts 5064.02, 5065.01, 5065.02, 5067.02, 5068.01 and 5068.04. Correction #42 introduces modifications involving Tracts 5021.01, 5026.02, 5027.01, 5027.02, 5063.02, 5064.02, 5065.01, 5065.02, 5081.02, 5082.02, 5102, 5104, 5117.01, 5117.03, 5117.04 and 5119.07. Correction #43 departs from the literal terms of

A.B. 300 in terms of Tracts 5067.02, 5068.01, 5068.02, 5068.04, 5081.01, 5081.02, 5082.01, 5082.02, 5087.02, 5099.01, 5100.01, 5102 and 5104. Correction #44 produces changes in the district assignment of Tracts 5116.01, 5117.01, 5117.03, 5117.04, 5119.03, 5119.04, and 5123.02.

"While most of the A.B. 300 districts are not so riddled with errors as 22 AD, a different version of 85% of districts (all except 2 AD, 4 AD, 8 AD, 9 AD, 16 AD, 17 AD, 26 AD, 27 AD, 29 AD, 31 AD, 48 AD and 61 AD) from that embodied in the corrected version of the 1981 assembly redistricting approved by the Legislature and signed by the Governor has been foisted upon the people of the state. While most of the 277 corrections set forth in the Third Tucker Declaration involve fewer than the ten tracts per correction which is the

average for the four corrections to 22 AD, it still is quite clear that the changes made are not mere 'technical corrections,' but a wholesale revision.

"By filing a supplemental appendix more than a week after the December 31, 1981 deadline established by the California Supreme Court, so that it reached counsel for Republical parties only on the day of the January 11, 1982 hearing in Assembly v. Deukmejian, Mr. Remcho and his associates avoided any possibility of rebuttal by the opposition. Because this appendix was filed before a decision was rendered in Assembly v. Deukmejian the Assembly has argued that the California Supreme Court intended to adopt the corrections embodied therein as part of the plan mandated by the court; but the majority opinion of Assembly v. Deukmejian refers at 643 and 678 to 1981 reapportionment

statutes 'passed by a majority of the Legislature and signed by the Governor,' a characterization not applicable to the 277 corrections in the Tucker Declaration.

"The situation here is quite different from that noted in Legislature v. Reinecke I (1972) 6 Cal.3d 595, 604 n. 3, where 18 undisputed clerical errors in the street descriptions of districts were corrected in an appendix to the court's opinion. In Assembly v. Deukmejian the Tucker corrections are not even mentioned, much less adopted by the court.

"Although Ms. Johansen alleges that 'the errors in A.B. 300 have been identified and corrected, using the procedures provided in A.B. 300 itself,' A.B. 300 provides no authority for post-enactment changes by the expedient of preparing maps of these changes and submitting them to the Secretary of State.

Section 30000, on which the Assembly relies, provides:

> 'Any maps describing the boundaries of the districts, as contained in this division, which have been prepared by the Legislature or a committee of the Legislature in connection with the enactment of this division may be deposited with the Secretary of State in order to illustrate the boundary lines set forth in this division.' Emphasis added.

Not only were the maps which allegedly authorize the Tucker corrections not prepared in connection with the enactment of A.B. 300, they were still incomplete long afterward, as Ms. Johansen acknowledges. Moreover, since Proposition 12 (including § 30000) was rejected by the voters, A.B. 300 itself was never enacted and cannot

legally authorize any corrections procedure."

028.51 Plaintiff summarizes the "Illegality of Proponents' 'Technical Corrections'" at 13 Record 476-479:

"The order of March 27, 1984 states:

> 'The court finds, as the Assembly contends, that the sole material issue of fact upon which the resolution of the plaintiff's challenge to the Assembly districts depends is the actual populations of the various districts and the extent to which they vary from each other. Indeed, the court does not understand the plaintiff to suggest the existence of any other material facts.' Id. at [12 Record 247]. Emphasis added.

If the court means by the preceding statement that plaintiff concedes that the 'various districts' to be evaluated are those defined by a printout supplied by James Tucker which is impossible to analyze, the court is mistaken. As plaintiff has noted at [13 Record 149] of his memorandum in support of reconsideration,

> 'The Assembly has sought to evade judicial enforcement of one-man-one-vote requirements applicable to state legislative districts by making unverifiable claims about a poorly defined version of the districts which has no legal status.'

"If the proponents of A.B. 300 had petitioned the California Supreme Court for a revised court order incorporating hundreds of departures from the

unambiguous terms of A.B. 300 this would have undermined the 'administrative feasibility' rationale for adopting the A.B. 300 districts. It also would have directed the Court's attention to the gross constitutional violations in A.B. 300 which the 'technical corrections' sought to ameliorate. Neither the Assembly nor the Court has cited any authority for the proposition that a court of law should evaluate the constitutionality of any version of a redistricting plan other than that established in law.

"Ever since Yick Wo v. Hopkins (1886) 118 U.S. 356 any power to make 'technical corrections' committed 'to the unrestrained will of a single public officer' has been ipso facto grounds for invalidation. 'In fact, an ordinance which clothes a single individual with such power hardly falls within the domain

of law, and we are constrained to pronounce it inoperative and void.' Id. at 372. Emphasis in original. See 3 Record 394-396. Also, as plaintiff has noted at 10 Record 156-157:

> 'In the case which is most pertinent with regard to the attempt to use the corrections process to cure constitutional defects the opinion makes clear that corrections for this purpose are not allowable. In Grivetti v. Illinois State Electoral Board (1971) 335 F. Supp. 779, 787 the Court discusses important aspects of the relationship between population disparities and drafting errors and says,
>
> > "On November 5, 1971, the commission filed with the Secretary of State

'notice of correction of typographical errors' in the August 7 plan, making corrections in four of the 59 districts, namely District Nos. 2, 3, 32 and 33. This court has carefully examined the original plan as it pertains to these districts, has compared the original descriptions with the corrected discriptions and concluded that the four corrections were bona fide 'typographical errors' and not post-plan attempts to cure the disparity first disclosed by the Evanston plaintiffs."'

"In the Assembly's rebuttal in

support of its motion for summary judgment the Assembly seeks to justify unauthorized corrections to the contested Assembly districts as follows: 'In any event, plaintiff has no federal claim based on the procedure by which they were implemented. See Order, July 1, 1982 at [4 Record 46].' 8 Record 310. In point of fact, deprivation of political rights by state officials operating completely outside the law is a federal due process violation. The order of July 1 at [4 Record 46] only rules out claims based on 'the judicial procedures employed by the California Supreme Court in its consideration and disposition of Assembly v. Deukmejian,' not claims arising from unauthorized district revisions by the Secretary of State.

"When plaintiff challenged the corrections process used to obscure

constitutional violations in the 1981 Assembly plan the Assembly took the position that this criticism was irrelevant because it was not made in the form of an affidavit. Dr. Halliwell's Declaration of June 6, 1984 [at 13 Record 197, 199] documents the facts that (a) a different version of 85% of Assembly districts was implemented and (b) no legal authority existed for these revisions. The Assembly's only response to this is a mere assertion -- unsworn and unsubstantiated by any data -- that these claims are not correct. See its opposition at [13 Record 440]."

028.61 Plaintiff inquired of the Assembly on July 2, 1984 at 13 Record 295: "In item #2 of Dr. Halliwell's affidavit of June 29, 1984 [at 13 Record 320-321, 324-325] 38 enumerated revisions to the A.B. 300 assembly districts are identified

for which plaintiff has maintained there is no legal authorization. These revisions are identified in the following table [at 13 Record 295-297] by number in the Halliwell declaration, by number in the Tucker declaration setting forth proponents' 'technical corrections,' and by description of the nature of the change in district boundaries. If any documents exist which authorize these revisions plaintiff hereby requests a copy of them. If these changes were authorized by maps submitted to the Secretary of State as provided in § 30000 of chapter 537 plaintiff hereby requests a legible facsimile of the maps, accompanied by an affidavit setting forth when and by whom the maps were prepared and the extent to which the Legislature, the Governor and/or the California Supreme Court relied on these maps in adopting the 1982

assembly plan."

028.67 Plaintiff inquired of the Assembly on July 2, 1984 at 13 Record 300-301: "At p. 12 of the Assembly's October 26, 1981 brief filed with the California Supreme Court the Assembly notes:

> 'The errors are not de minimus. They number at least 37 in the Assembly petition alone.'

According to the Assembly:

> 'Section 3515 of the California Elections Code requires that the full text of the statute against which a referendum is sought appear on each referendum petition and section thereof. In plain violation of that statutory command, the petitions being circulated by real parties in interest illegally and

> inaccurately set forth substantially inaccurate versions of the statutes in dispute. In the Assembly petition, for example, census tracts and block data covering no less than 67,000 persons have been inaccurately printed.' Assembly's petition for mandamus at 9.

Does the Assembly admit that the discrepancies between its own corrected version of the Assembly plan and the text of the enacting legislation are more numerous, are more substantial, and involve more people than those which the Assembly alleged invalidated referendum petitions filed against A.B. 300?"

028.75 Plaintiff summarizes "Drafting Errors in A.B. 301" at 1 Record 196:

"The attitude of proponents of A.B. 301 congressional districts seems to have been to 'tough it out' and ignore any defects in their bill that were not very minor. While the Secretary of State accepted contiguity and equalizing population as the basis for many Assembly district corrections, no such standards were applied to congressional districts. [See 1 Record 196-199]."

028.85 Plaintiff contends at 10 Record 166:

"The unauthorized corrections to the Legislature's 1981 congressional plan are discussed at 1 Record 196-199. These corrections are certainly less far-reaching than the corrections to the 1981 assembly plan; however, none

of the defendants, including the Secretary of State who approved and implemented the corrections, has contested plaintiff's statement that many of these congressional corrections are in fact politically motivated and/or contrary to the unambiguous provisions of A.B. 301."

028.95 Plaintiff contends at 1 Record 199:

"Quite unlike the two redistricting bills in which the Assembly reapportionment committee played the major role, the corrections process for the Senate redistricting plan was quite straightforward. There were only 5 census tracts unassigned in the Senate's redistricting plan after the passage of cleanup legislation (S.B.7). Three of these are in the interior of districts, one is lying on a district

border separated from the other district and only one (tract 999.01 in Orange County) is assignable to either of two districts."

#029 UNAUTHORIZED REVISIONS TO THE 1984 DISTRICTS

029.31 Plaintiff contends at 10 Record 174:

"The Secretary of State's submission to the county clerks of a different version of A.B. 2X from that enacted by the Legislature probably is due to her having decided that the bill as passed was likely to be declared unconstitutional and that any redistricting bill that Governor Deukmejian would sign would be less advantageous to the Democratic Party than the Berman version of A.B. 2X. Oral arguments on Karcher v. Daggett were heard by the U.S. Supreme Court on March 2, 1983 (see 103 S.Ct. 2653), and it became apparent that both Justices whose votes would decide the case (O'Connor and Stevens) probably would vote to overturn the New Jersey plan. On March 4, 1983 the Republican National Committee challenged the

California Legislature's 1983 congressional redistricting plan in federal court (Badham v. Eu Northern Cal. Dist. No. C-83-1126RHS) on the same population disparity and partisan gerrymandering grounds used to attack the New Jersey plan in Karcher v. Daggett. On March 17, 1983 the Secretary of State ordered county clerks to use the Berman 'technical corrections' (see Appendix I [at 10 Record 332-341]) in preparing for the 1984 elections in place of the provisions of the Legislature's redistricting plans which these 'technical corrections' replace."

029.35 Plaintiff contends at 10 Record 174:

"The decision of Secretary of State March Fong Eu to accept the 'technical corrections' to the congressional districts enacted by A.B. 2X as if they were a duly enacted cleanup bill is wholly without

legal justification. In Legislature v. Deukmejian supra at 32 the California Supreme Court notes, '[T]he Secretary of State has no discretion to refuse to submit a properly qualified initiative measure to the voters (Farley v. Healey (1967) 67 Cal. 2d 325, 327) . . . .' It must also be true that the Secretary of State has no discretion to refuse to submit portions of a redistricting bill passed by the Legislature and signed by the Governor to the county clerks for implementation. As the cited reference to Farley v. Healy supra notes, 'These questions may involve difficult legal issues that only a court can determine.'"

029.43 Plaintiff contends at 10 Record 166-170:

"The problems that New Jersey Democrats were having with their congressional plan in Karcher v. Daggett caused proponents

of the California congressional plan grave concern, since their plan was also a combination of population disparities around 1% coupled with outrageous partisan gerrymandering. Practically as soon as it was enacted the 1983 congressional plan began to be revised by its proponents, and thus the architects of the 1983 congressional plan created many districts which seem to fit plaintiff's description of 22 AD in A.B. 300: 'This district represents a bold new advance in reapportionment thinking: pass a thumbnail sketch of a district, then fill in the details after the Legislature has voted.' 1 Record 192.

"In many instances these revisions were in clear conflict with the original legislative intent [see 10 Record 171-174, 332-341]. One particularly well-documented instance involved 16 CD, which had contained three whole

counties and a small part of a fourth in the 1981 congressional plan. The 1983 plan severely fragmented Santa Cruz County, the political base of Senator Mello, whose vote was needed to pass the enacting legislation. To mollify Senator Mello an amendment which he proposed (see Senate Journal (First Extraordinary Session)) on December 29, 1982 was adopted; it reduced the fragmentation of Santa Cruz County by about 8,000 persons, and Senator Mello cast the decisive 21st vote in favor of the plan. See Senate Journal, ibid. at 130.

"It is possible that given more time before the expiration of Jerry Brown's term as Governor, Senator Mello could have been pressured into supporting the 1983 congressional plan even without his amendment. When opposition developed in the Senate to 1981 modifications to former Senator Beilenson's congressional

district the California Journal noted: 'Resistance . . . was crushed in the State Senate by a charge from Democratic National Chairman Charles Mannatt and associates.' 3 Record 209. However, since the new congressional plan was signed by Jerry Brown on his last day in office it must be assumed that the Mello amendment to partially restore the geographic integrity of Santa Cruz County was essential to the enactment of the Legislature's 1983 congressional redistricting plan.

"Not withstanding the pivotal nature of the Mello amendment it was promptly undone by pressure from Washington; there members of the Democratic congressional delegation had become acutely concerned about the potential for disaster implicit in Karcher v. Daggett, then being considered by the U.S. Supreme Court after a district

court had ruled the New Jersey congressional plan to be unconstitutional. The Democratic members of the California congressional delegation dispatched Mr. Michael Berman from Washington, D.C. with instructions to virtually eliminate population disparities in the new congressional redistricting plan, even at the expense of aggravating violations of the geographic integrity requirements of Article XXI. Mr. Berman, in consultation with James Tucker, an aide of Assemblyman Richard Alatorre, the former Chairman of the Assembly Elections and Reapportionment Committee, prepared a list of 'technical corrections' to undo Senator Mello's Santa Cruz amendment and made about 40 other changes to 31 districts. Most of these changes were absolutely contrary to the original language and intent of the enacting legislation.

"Maps reflecting these corrections

were then prepared by Mr. Berman, and these maps and the list of corrections were given to Mr. Tucker, who delivered them to the Secretary of State as if they were maps and derived corrections prepared pursuant to Elections Code §30000. Such a subterfuge would be farcical if it did not once again demonstrate how quickly a trickle of official corruption becomes a flood when left unchecked by judicial review. These maneuvers cannot bear even the most cursory scrutiny.

1) Both the maps and the corrections were prepared <u>after</u> enactment of the congressional plan, not in connection with the enactment of the plan as provided by § 30000.

2) The maps were prepared from corrections decided upon by the Democratic members of the California congressional delegation, not by the Legislature or a committee of the

Legislature as § 30000 provides.

3) The maps were prepared from the corrections, not the other way around as envisioned by § 30000.

4) However derived, maps may be used only to interpret redistricting legislation; § 30000 does not authorize the use of maps to amend clear and unambiguous provisions of such legislation.

5) Even if maps could take precedence over the written provisions of redistricting legislation, all legislation in whatever form must be put into its final version and made available for inspection by the Legislature before it is approved by the Legislature.

6) The operative version of any legislation is that which is presented to the Governor for his signature. The maps cannot have been presented to

Governor Brown because they were prepared long after he left office.

"Even if the California Supreme Court were to somehow construe the Berman maps to constitute the appropriate version of the Legislature's 1983 congressional redistricting plan to be used for the 1984 elections, such a contorted interpretation of California law would be subject to reversal in federal court. In connection with far less vital federally protected rights the U.S. Supreme Court has ruled:

> 'We are driven to a different construction of the charter, notwithstanding the deference naturally felt for the decision of a state court upon state law. The language is plain.' Terre Haute Railroad Co. v. Indiana (1904) 194 U.S. 579, 587.

The Supreme Court has also unequivocally

stated that when fundamental federally protected rights are defined in terms of state law (as is true of contractual, property and voting rights) the Supreme Court has the final authority regarding what the state law means.

> 'It is well known that this court will decide for itself whether a contract was made as well as whether the obligation of the contract has been impaired. [Citation.] But that is merely an illustration of a more general rule.' Rogers v. Alabama (1904) 192 U.S. 226, 230."

029.53a Plaintiff contends at 12 Record 72-73:

"The corrections to the districts adopted by the Legislature in 1983 which were incorporated by the Secretary of State

without any sort of legal basis for doing so are analyzed in detail at 10 Record 147-176 and 10 Record 332-341. At 8 Record 163-164 plaintiff has noted that similarly unauthorized changes were made in the districts used to conduct the 1982 elections.

> 'Shortly before filing this suit plaintiff discussed the authority for making these [277] changes with Anthony Miller, chief counsel for the Secretary of State. Mr. Miller stated that since he couldn't read minds he was accepting any change that the Assembly elections and reapportionment committee claimed were intended by the proponents of A.B. 300. Since filing this suit, plaintiff has repeatedly and without success sought some justification from the Secretary

of State for her carte-blanche corrections policy.'

More than six months have passed since plaintiff last challenged defendant to provide some justification for simply ignoring the law by repeatedly substituting her own version of various districts for those actually mandated by the proper authorities (8 Record 541), but he still has received no response even though this court's order of April 19, 1983 affirmed the obligation of the Secretary of State to defend the use of the contested districts."

029.53b Defendant responds to plaintiff's Inquiry No. A at 13 Record 462-463:

"Plaintiff's 'Discovery Request' seeks a boundary description of the congressional districts California is currently using. Defendant objects to the request on the

ground that the boundary lines of the current California congressional districts are not in issue in the instant litigation, and therefore are not relevant to the subject matter of the pending litigation. They therefore do not fall within the scope of discoverable material under F.R.C.P. 26(b)(1)."

029.53c Plaintiff inquired of defendant on July 2, 1984 at 13 Record 288: "At [12 Record 459] of her dismissal motion of April 20, 1984 defendant urges that 'there is no present case or controversy raised by the complaint in this action regarding the congressional districts California is currently using' on account of 'new congressional redistricting plans to be used in 1984 and in subsequent years. Stats. 1983, Chapter 6.' Plaintiff has reason to believe that 'the congressional districts California

is currently using' are in many instances not those described by Stats. 1983, Chapter 6. Plaintiff therefore requests that defendant supply a certified copy of Stats. 1983, Chapter 6 with any administrative modifications noted thereon so that the districts being used for the 1984 elections are accurately reflected in this document. Plaintiff also requests that an affidavit be filed explaining any modifications and that if these modifications are authorized by maps a copy of these maps be supplied along with an affidavit noting when the maps were prepared and the extent to which the Legislature relied on these maps when it enacted Chapter 6."

029.55 Plaintiff argued on August 18, 1984 at 13 Record 574-575:

"In her responses to plaintiff's inquiries defendant supplies little if any

meaningful information.

"Rule 26(b)(1), cited by defendant as grounds for her refusal to respond to this inquiry [No.A.], provides:

> 'It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.'

Determination of which districts are actually being used to conduct California's elections is obviously an essential preliminary to a broad range of permissible lines of inquiry. Most importantly, this bears on plaintiff's complaints regarding the Secretary of State's continuing practice of operating outside the law in her stewardship of the elections process to determine what districts shall be used

when this serves the interests of the Democratic Party.

"Another pertinent issue is the presumptive validity of the 1984 districts, which was cited by the order of March 27, 1984 [at 13 Record 241] as partial grounds for the court's disposition of plaintiff's motions regarding the 1982 districts. This validity clearly depends on these districts' having been duly enacted. Moreover, since the court is currently considering a motion to expand the scope of these proceedings to include the 1984 redistricting plans, these districts are clearly relevant in that context also. Indeed, the Secretary of State herself contends in her dismissal motion of April 20, 1984 that the congressional districts embodied in Stats. 1983, Chapter 6 are relevant to these proceedings. Obviously this would be so even if

defendant had not sought to invoke these districts for her own purposes; yet she refuses to respond to a discovery request seeking to verify that these districts are in fact being employed to conduct California's congressional elections."

#081 ABROGATION OF REFERENDUM STAY PROVISIONS

081.11 Plaintiff contends at 6 Record 135-136:

"In spite of acknowledging (at [30 Cal.3d] 678) that provisions of the California Constitution which have 'been vigilantly protected by the courts' make it illegal 'to evade the effect of the referendum petition' by enacting redistricting plans not 'essentially different' from those blocked by referendum petition, the [California Supreme] Court adopted as its own plans the very same districts which had been blocked by referendum petition. The Court justified this action on the grounds that it would take so long to program computers to use any of the alternative redistricting plans available to the Court that a separate primary election might have to be held for district offices at an estimated cost of $12 million."

081.15 Plaintiff contends at 3 Record 171-172:

"According to the Supreme Court's decision, 1982 legislative elections will be conducted in districts set forth by the Legislature even though all three redistricting bills were blocked by referendum petitions containing twice the necessary number of signatures.

". . . . .

"California voters will have an opportunity in June 1982 to reject the Legislature's redistricting plans, but even if A.B. 301, S.B. 99 and A.B. 300 are all voted down the districts therein will remain in effect for the November general election. Legislators elected in these districts will then be able to pass another redistricting plan to preserve their seats and ignore any referendum petitions against these new districts until after they are used in the next election.

Presumably this process could go on indefinitely."

081.21a The Assembly contends at 3 Record 241-242:

"Indeed, the court found the principle of one person, one vote so compelling that it held that Article II § 10 of the California Constitution, which stays the effective date of a statute subject to referendum, must give way before it."

081.21b Plaintiff replies to the Assembly at 3 Record 338-339:

"There is no support in any decision of the United States Supreme Court for the position that population shifts during the ten years between reapportionments must be corrected immediately even if this requires gross violations of constitutionally prescribed political processes. In fact, Pruneyard Shopping Center v. Robins

1980) 447 U.S. 74 clearly indicates that the requirements of the 14th Amendment are flexible enough to allow substantial leeway for rights which state courts may infer from state constitutional provisions. Logically even greater leeway should be allowed for rights such as the referendum which are explicitly mandated by state constitutions."

081.27 Plaintiff contends at 10 Record 218-219:

"If the California Supreme Court found all of the available alternatives (see 5 Record 297-376, 384-389) to the Legislature's redistricting plans to be unsatisfactory it should have devised its own redistricting plans during some of the 4 1/2 months which it took to decide that referendum petitions with 2 1/2 times the necessary number of valid signatures were indeed adequate to block

enactment of the Legislature's plans even though a small fraction of the signers had moved without re-registering.

"The snail's pace of consideration in Assembly v. Deukmejian was entirely inappropriate in the face of an impending election, as even the Assembly admits:

> 'The urgency of these matters is best illustrated by the speed with which the Court moved in Reinecke I . . . the petition was filed on December 15, 1971 . . . and the case was decided on January 18, 1972.' 1 Record 16, 207.

Even if no other new districts other than the Legislature's were available or could have been devised, Lucas v. Colorado General Assembly (1964) 377 U.S. 713 makes it clear that a constitutionally

required redistricting may be delayed for one election to allow a state's political processes to function. Lucas is especially applicable since the two-year delay in redistricting which was approved by the U.S. Supreme Court was to allow for the use of Colorado's initiative and referendum."

081.33 Plaintiff contends at 3 Record 178:

"It can hardly be argued that the referendum has been overused; before 1982 it had not been employed in 30 years. If as a majority [of the California Supreme Court] fears a pattern should develop wherein every ten years the people of California exercise this basic right to give themselves the final say on reapportionment, either the Governor can call a special election before the primary or the Legislature can do the same

thing by passing a statute immune to referendum. If in fact the people do back the party in power by supporting the proposed districts in the special election, reapportioned districts will go into immediate effect in time for the regularly scheduled primary and general elections to be conducted in these districts.

"It is true that a special election for California's 11 million voters would cost $12 million, or $1.09 per voter. Many Americans have laid down their lives to defend our system of free elections. Is the right of each voter to vote in legislative elections conducted according to constitutional requirements not worth $1.09? The chemicals in a human body are worth more than that."

081.39 Plaintiff contends at 3 Record 293-294: "The majority opinion [of Assembly v. Deukmejian seeks to justify] its abrogation of the referendum provisions of the California Constitution . . . [by blurring] the distinction between redistricting plans which have been affirmatively blocked and those 'which are not yet final within the framework of a state constitution.' Any plan which has completed part of the normal process of enactment has higher status than other plans which might be suggested. Under the California Constitution a plan blocked by referendum petition is outside the scope of consideration of the Legislature and the courts and is thereby of lesser status than other plans which might be suggested. In fact, the negative status of redistricting plans blocked by referendum involves not only the plans

themselves but also all other plans that are not essentially different."

081.47 Plaintiff contends at 3 Record 180-181:

"It is true that so long as they operate within constitutionally prescribed limits legislatures have the legal responsibility for legislative redistricting. It is ridiculous to suppose that legislators will be more influenced by public opinion than by their own self interest in drawing legislative district boundaries. It is precisely because legislators have consistently flouted the public will on this issue that the voters amended Article XXI into the state Constitution. Thus there is no factual basis for the assertion made by Chief Justice Bird (during January 11, 1982 oral arguments) that 'the Legislature's action on

redistricting is the nearest approximation to the public will,' however reasonable it might be regarding most other issues except legislator's salaries and benefits.

"Quite contrary to the court's assumption that it is as likely as not that people will vote to accept the Legislature's redistricting plans, the public opposition to these gerrymanders is overwhelming. In much less than the allotted time 900,000 people, 2 1/2 times the number necessary, signed three petitions to block each of the legislature's redistricting plans. More than 100,000 of these people contributed an average of $14 each to pay for this referendum effort. Opinion polls show that the Legislature's redistricting plans are opposed by a 3-1 margin. Nearly every newspaper, radio and television editorial on this subject has

opposed the Legislature's redistricting plans."

081.55 Plaintiff contends at 5 Record 224:

"The bulk of the majority opinion in Assembly v. Deukmejian (1982) 30 Cal. 3d 638 is devoted to an analysis of the validity of referendum petitions filed against the contested districts. The Court concluded that the referendum petitions were valid and that the legislation which sought to enact the Legislature's redistricting plans was without effect unless it was subsequently approved by the voters (all three plans were rejected by margins of about 62% to 38%). The only part of the decision in Assembly v. Deukmejian which plaintiff disputes is the equitable discretion portion which orders into effect the very districts which have the least

possible status under California law.

"It is clear that under powers reserved by the people of California 'unto themselves' (not merely denied to the Legislature) any definition of state reapportionment policy by the electorate takes precedence over a contrary decision by the State Supreme Court. Only urgency statutes, which require a 2/3 vote from both houses of the State Legislature, are not subject to referendum; but once legislation is blocked by referendum petition and not approved by the voters no legislation that is not 'essentially different' may be enacted by even a unanimous Legislature. In re Stratham (1920) 45 Cal. App. 436, 439-440; reaffirmed Assembly v. Deukmejian (1982) 30 Cal. 3d 638, 678."

081.65 Plaintiff contends at 10 Record 214-216: "In seeking to find some basis in the California Constitution for ordering into effect redistricting plans which had been blocked by referendum petitions the majority opinion in Assembly v. Deukmejian stated: 'Nothing in our state Constitution dictates that the stay provision of article II should have more force and effect than the commands of article XXI or the equal protection clause of article I section 7.' But there is absolutely nothing in Article XXI or Article I § 7 which authorizes, much less requires, a court to adopt redistricting plans that have been blocked by referendum petition -- much less plans which flagrantly violate the requirements for districts in Article XXI and are blatantly gerrymandered to deny equal representation to Republicans and also dilute the

voting power of blacks and Hispanics. On the contrary, referendum stay provisions are clear and unequivocal, as the dissenting opinion in Assembly v. Deukmejian notes:

> 'As we recently observed, "The amendment of the California Constitution in 1911 to provide for the initiative and referendum signifies one of the outstanding achievements of the Progressive movement of the early 1900's. Drafted in light of the theory that all power of government ultimately resides in the people, the amendment speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them. Declaring it 'the duty of the courts to jealously guard this

right of the people' [citation], the courts have described the initiative and referendum as articulating 'one of the most precious rights of our democratic process' [citation]. '[I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it.' [Citations.]" (Associated Home Builders Etc., v. City of Livermore (1976) 18 Cal.3d 582, 591 [citations]. We are "jealously [to] guard" this "precious" right.' 30 Cal.3d at 680-681.

"Moreover, the special status of

political rights reserved by the people unto themselves is not simply a matter of long-established precedent. Article I § 3, adopted by the electorate on November 5, 1974, states that 'The people have the right to instruct their representatives . . . .' This applies equally to positive instructions via the initiative and negative instructions via the referendum."

081.75 Plaintiff contends at 5 Record 256-259:

"Also, the California Supreme Court ordered these redistricting plans into effect in defiance of referendum provisions of the California Constitution, which provides that no bill challenged by petitions bearing sufficient signatures shall go into effect until after it is voted upon and passed by the people. This part of the Constitution

is our only safeguard against legislation that would produce irreparable damage before it could be repealed by initiative. The minority opinion cites the well-established principles which should have governed this case:

> 'First, the referendum and initiative are very special and favored rights. As we recently observed, . . . the courts have described the initiative and referendum as articulating "one of the most precious rights of our democratic process" [citation]. "[I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve

power, courts will preserve it." [Citations.]' Id. at 680.

Nearly 2 1/2 times the necessary number of signatures needed to block the contested redistricting plans were gathered in less than two months; there was plenty of time to hold a special election on the contested districts before the June primary. A statewide special election would have cost $12 million, or $1.09 for each of California's 11 million voters. This is a small price to pay for the preservation of a basic political right. The notion that a savings to taxpayers much larger than the $1.09 per voter involved here can justify an incursion on the prerogatives of voters is explicitly rejected by the United States Supreme Court in Bullock v. Carter (1972) 405 U.S. 134, 147.

'But under the standard of review we consider applicable

to this case, there must be a showing of necessity. Appellants strenuously urge that apportioning the cost among the candidates is the only feasible means for financing the primaries.'

'Viewing the myriad governmental functions supported from general revenues, it is difficult to single out any of a higher order than the conduct of elections at all levels to bring forth those persons desired by their fellow citizens to govern. Without making light of the State's interest in husbanding its revenues, we fail to see such an element of necessity in the State's present means of financing primaries as to justify the resulting incursion on the

prerogatives of voters.' Id. at 148-149.

"Yet the majority opinion in Assembly v. Deukmejian states,

'If a referendum signed by 5 percent of the voters can stop a legislatively enacted reapportionment plan for a period of two or four years even if it is subsequently adopted by the citizens at a statewide election, then a small minority could thwart the will of a majority of the citizens simply by obtaining a small number of signatures on a petition.' Id. at 676.

'The Legislature should address this problem and fashion a procedure that will eliminate the delay and wasted resources caused by the current process.' Id. at 677-678.

"But the California Supreme Court has no authority to abrogate the referendum provisions of the California Constitution on the grounds that a 'mere' 5% of the electorate should not be allowed to create a nuisance. Nevertheless, the majority of the California Supreme Court justifies its nullification of the State Constitution because it 'minimizes disruption to the election process.' Id. at 678. As the District Court in Graves v. Barnes IV (1977) 446 F.Supp. 560, 571 notes, 'It will ultimately serve no one for us to ignore constitutional norms in the name of convenience and administrative inertia.'"

081.85 Plaintiff contends at 8 Record 297-298:

"Plaintiff, along with the minority of the California Supreme Court, has

alleged that the majority in Assembly v. Deukmejian has restructured public decisionmaking in California by abrogating referendum stay provisions. See 3 Record 177. In his dissenting opinion (30 Cal. 3d at 681-682) Justice Richardson notes that

> 'The majority finds it anomalous that a "mere" 5 percent of the voters can effectively postpone the Legislature's reapportionment plan. The answer, of course, is that this was the people's own decision to fix the qualification at 5 percent. In actuality the signatures were in excess of 12 percent and these were speedily obtained. . . . The majority's quarrel on this score is more appropriately directed to the framers of the State

> Constitution and to the people themselves who, in adopting the provision, authored the dual protections of gubernatorial veto and referendum stay as safeguards against legislative abuses.' 3 Record 177-178.

Richardson's opinion is supported by Justice Mosk: 'I join Justice Richardson's concurring and dissenting opinion' (30 Cal. 3d at 693). It is also supported by Justice Kaus: 'I have signed . . . Justice Richardson's dissent.' (30 Cal. 3d at 694)"

#082 VITIATION OF THE JUNE 1982 REFERENDA

082.11 Plaintiff contends at 8 Record 512:

"It would be a political miracle if a legislature with an overwhelming personal stake in preserving a scheme of legislative districting which produces essentially the same political results as the districts from which that legislature was elected nevertheless enacted essentially different redistricting plans. As this analysis [8 Record 514-537] will clearly show, the Legislature's 1983 redistricting plans embody no such miracle. Quite to the contrary, these new redistricting plans provide districts even safer for incumbents than the district used in 1982.

"This objective was accomplished by violating constitutional requirements to an even greater degree than was done

in the 1981 redistricting legislation."

082.31 Plaintiff contends at 10 Record 300-303:

"The essential purpose of the referendum is to assure that ultimate control of policy decisions will remain with a majority of the electorate. This is the same basic objective of the one person, one vote principle enunciated by the United States Supreme Court, as the District Court notes in Hensley v. Wood (1971 329 F.Supp. 787, 790:

> 'The fundamental rationale of all apportionment cases is perhaps best stated in the Reynolds opinion: "a majority of the people of a state [should] elect a majority of legislators . . . . Since legislatures are responsible for enacting laws by which all citizens are to be

governed, they should be bodies which are collectively responsive to the popular will."'

It is therefore doubly important that a redistricting plan which replaces one that has been rejected by referendum demonstrably satisfy the objections of the voters who rejected the original plan. The majority opinion in Assembly v. Deukmejian accordingly notes that provisions of the California Constitution which have 'been vigilantly protected by the courts' make it illegal 'to evade the effect of the referendum petition' by enacting redistricting plans not 'essentially different' from those rejected by the voters. [30 Cal. 3d.] at 678.

"But none of the Legislature's 1983 redistricting plans comes close to being essentially different from the districts which the voters rejected in

June of 1982. At 8 Record 514-522 the changes in the congressional plan are summarized. Most congressional districts have very minor changes; the average district is 90% the same as its predecessor in A.B. 301. At 8 Record 523-529 the changes in the senate plan are summarized. The changes in senate districts are even less substantial than in congressional districts; the average district is 91% the same as it was in S.B. 99. At 8 Record 530-537 the changes in the assembly plan are summarized. The changes in assembly districts are the least in any of the three sets of districts; the average district is 92% the same as it was in A.B. 300.

"Since the Secretary of State publishes district-by-district election returns for all major ballot propositions it is possible to pick out the districts that were most unsatisfactory

to the voters therein and examine the changes made in those districts. It is clearly demonstrable that no improvement has been made in enough districts in each of the three plans to permit one to account for enough votes against Proposition 10 (congressional), 11 (senate) and 12 (assembly) to account for an absolute majority of the electorate: 2,448,745, 2,446,414, and 2,444,387 votes for Propositions 10, 11 and 12, respectively. Thus even if one were to assume that every voter in ~~the remaining~~ districts was satisfied with the new redistricting plan the changes in the new plans are demonstrated to have been insufficient to have reversed the results of the June 1982 referenda.

"In the following presentation [at 10 Record 304-319, 342-350] of the data supporting the assertion that

insufficient changes have been made to each of the plans the districts providing the votes to constitute an absolute majority against Propositions 10, 11, and 12 are listed first, with a district-by-district discussion of the small changes made by the new districts (if there have been other than trivial changes). Then the group of districts not needed to provide the statewide majority are discussed, and it is shown that the changes in this group either made the district worse or left its major defects unchanged in so many instances that the aggregate vote from this group of districts probably would go against the new plans if the residents of these districts were given the opportunity to vote on them. Taken together, the evidence from both groups of districts will show that it is likely that the new redistricting plans would

be rejected by even greater margins than were A.B. 301, S.B. 99 and A.B. 300."

082.41 Plaintiff contends at 8 Record 539-541:

"As an excuse for circumventing a second referendum challenge to the Legislature's master plan for political self preservation, Sec. 8 of S.B. X-3 states:

> 'This act is an urgency statute necessary for the immediate preservation of the public peace, health or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:
>
> 'In order that the Secretary of State and the several county clerks may have sufficient time to prepare for the 1984 elections, and in order to comply

> at the earliest possible time with the California Supreme Court ruling ordering the Legislature to adopt an essentially different plan in time for the 1984 elections, it is necessary that this act take effect immediately.'

"When the Legislature was employing a 'run-out-the-clock' strategy to force the use of its redistricting plans for the 1982 elections it consumed the entire 1981 regular session, a period of eight months, in devising and enacting redistricting legislation. When there was a political advantage to be gained by speed rather than by delay the Legislature took less than one month to produce new redistricting legislation. Since September 15, 1981 was much nearer to the 1982 elections than January 2, 1983 is to the 1984 elections,

there is certainly no administrative excuse for invoking 'the public peace, health or safety' to impose the Legislature's 1983 plans to redistrict itself without allowing an opportunity for the people to vote before the new districts become law.

"Prompt compliance with constitutional requirements is certainly commendable, but even if the new redistricting plans were constitutionally adequate there was no need to rush them to the lame-duck Governor for his signature when they could have been signed or vetoed by the newly elected Governor on the very next day. The deference which courts usually accord to redistricting plans enacted by the political branches of state government is completely inappropriate when a public official who has been rejected by the voters causes legislation to be

rushed through to pre-empt action by his successor.

"Redistricting plans which are more than 90% unchanged from plans that have been rejected by the voters cannot be termed 'essentially different.' Since those changes that were made aggravated the defects in the previously rejected districts it was obvious to the Legislature that the voters would reject their latest political gerrymander and if given an opportunity to vote in constitutionally adequate districts would reject many of the legislators who had attempted to insulate themselves from public accountability."

082.61 Plaintiff contends at 10 Record 318:

"It is precisely because there is no basis whatsoever for supposing that the electorate would find the new

redistricting plans acceptable that the architects of these plans protected themselves from the voters' wrath by enacting their own redistricting plans with an urgency clause so that the plans could not be subject to referendum. Since there is no way to undo the new senate and assembly redistricting plans and no way to elect a representative legislature from the districts in these plans there was no point in challenging the congressional plan only to see it replaced with something even worse."

082.81 Plaintiff argued on July 9, 1984 at 13 Record 351:

"Before the constitutionality of the 1982 districts was adjudicated legislators elected from these districts enacted redistricting plans which were 90%-92% unchanged from those

resoundingly rejected by the people of California. These are to govern congressional and state legislative elections for the balance of the decade, so the impairment of political rights is much greater than if the people of California were deprived of effective control of their political institutions for only one election."

#087 GUARANTY CLAUSE PROTECTION OF POLITICAL RIGHTS

087.11 Plaintiff contends at 9 Record 257:

"While there is substantial diversity of opinion among sitting members of the U.S Supreme Court on the scope of 'state's rights' in cases involving federal issues, the Justices, from the most liberal to the most conservative, all support the propriety of federal intervention to assure political equality and effective popular sovereignty. [See 9 Record 257-263]."

087.19 Plaintiff contends at 4 Record 207:

"The violation of majority rule resulting from implementing the contested districts in spite of their rejection by the people is compounded in the case of the Senate plan. In the Senate plan

scheduled elections have been postponed in two districts, thus totally denying them any representation, and held ahead of time in two others. The double representation which this allows the two favored districts makes it possible for the Senate to be controlled by only 45% of California's population: still another violation of majority rule.

"Majority rule cannot exist, of course, without equality of representation. The importance of equality in a republican form of government is also affirmed in United States v. Cruikshank:

> 'The equality of rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle if within its power.' Id. at 555."

087.27 Plaintiff contends at 4 Record 206-207:

"It is precisely because the right to cast a meaningful vote is so fundamental that the abrogation of the referendum powers of the people of California is a serious abridgement of a republican form of government. This is all the more so because the subject matter of the referendum was central to the political process itself. At one stroke the California Supreme Court took from the people the control of their institutions of representative democracy, insofar as these determine the makeup of California's state legislature and congressional delegation.

"The role of the referendum in a republican form of government has been recognized by several Supreme Court decisions. In United States v. Cruikshank (1875) 92 U.S. 542 the Court notes:

'The very idea of a government, republican in form, implies a right on the part of its citizens to . . . petition for a redress of grievances.' Id. at 552. While the initiative and referendum are not mentioned in this opinion, the right of people to band together and submit a petition which, with the assent of a majority of the electorate, is binding on the government is clearly within its spirit. Later Supreme Court decisions such as James v. Valtierra (1971) 402 U.S. 137 and Citizens Against Rent Control v. City of Berkeley (1981) 102 S.Ct. 434, 444-445 explicitly recognize the 'use of referendums to give citizens a voice on questions of public policy [in order to] keep political bosses and legislators honest.' In this case the Court's implementation of the Legislature's redistricting plans in spite of their having been blocked

by the people by referenda petitions has allowed 'political bosses and legislators' to create safe districts for themselves in defiance of majority rule."

087.35 Plaintiff contends at 5 Record 98-99:

"In the case at bar the most serious alleged violation of the Guaranty Clause is the abrogation by the California Supreme Court of referendum rights reserved by the California Constitution unto the people themselves. Probably the Guaranty Clause precedent most applicable to this situation is In re Interrogatories Propounded by Senate, Etc. (1975) Colorado, 536 P. 2d 308, 314-315:

> 'if the statute is allowed to operate as the legislature intended, Amendment No. 9,

the recipient of the greatest popular support, will be given effect as the expression of the predominant will of the people. Viewed in this perspective, there is no question that this statute enhances rather than restricts the right of the people to amend the constitution.

'This interpretation is not only consistent with the legislative mandate and in furtherance of the principles of initiative and referendum, it is the only interpretation that is consistent with Article IV, Section 4 of the United States Constitution. That section, which guarantees "to every State in this Union a Republican Form of Government," must, at the very least, mean

that the "supreme power resides in the body of the people." Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 457, 1 L.Ed. 440. Therefore, since popular sovereignty and concepts of republicanism are inextricably bound together, and, since Amendment No. 9 is the clearest expression of the former, it must, consistent with the most fundamental principles of the federal constitution, prevail.'"

087.43 Plaintiff summarizes "Violations of Guaranty Clause" at 4 Record 198:

"The abridgement of republican government which has occurred in California involves congressional, Senate and Assembly districts which flagrantly

violate the requirements for such districts contained in Article XXI of the California Constitution and which have been blocked from enactment by referendum petition and subsequent rejection by the voters according to the provisions of Sections 9 and 10 of Article II of the California Constitution. These districts have nevertheless been ordered into effect by the California Supreme Court. This abrogation of constitutional government in California strikes at the heart of the political process. The political distortion that will certainly arise from these unconstitutionally gerrymandered districts is much greater than that produced by the false tally in United States v. Classic 313 U.S. 299, by the refusal to count votes from some precincts in United States v. Mosley 238 U.S. 383, or by the stuffing of the

ballot box in United States v. Saylor 332 U.S. 385."

087.51 Plaintiff contends at 3 Record 301:

"None of the defendants contests the central reality in this case, the fact that the California Supreme Court deprived California voters of vital political rights. Nor have the defendants attempted to justify the flimsy contrivances employed by the California Supreme Court to produce 'compelling practical reasons' for ignoring alternative redistricting plans and mandating the Legislature's redistricting plans in spite of their numerous constitutional defects. Instead the main defense argument has been that whatever the California Supreme Court may have done, it is no business of the federal courts to even examine its

actions.

"Plaintiff contends that the due process clause of the 14th Amendment and the Guaranty Clause of Article IV Section 4 clearly protect California's institutions of representative democracy from the abuses they have suffered at the hands of the California Supreme Court. Since plaintiff has thoroughly documented every aspect of his allegations and since no rebuttal has been offered to any of plaintiff's charges, it is the defendants whose arguments are ill-conceived and frivolous."

087.61 Plaintiff contends at 7 Record 111-112:

"Because of the unprecedented severity of the threat to the integrity of California's political institutions arising out of Assembly v. Deukmejian and subsequent events, plaintiff's

Guaranty Clause claims are a vital part of this case. Reform groups seeking to restrain the practice of legislative gerrymandering have done everything that can conceivably be asked of them to preserve their political rights. They secured enactment of a constitutional amendment well in advance of the decennial redistricting; they devised model plans to implement this amendment well before the Legislature enacted its plans; they organized a referendum campaign which resulted in the rejection of redistricting plans which flagrantly violate constitutional requirements. These reformers and the majority of the electorate which they represent have been utterly betrayed by the California Supreme Court, which has refused to enforce and has actively violated its own State Constitution. The defenders of the integrity of

California's institutions of representative democracy therefore properly invoke the last line of defense for the rule of law, the Guaranty Clause of Article IV § 4 of the United States Constitution."

087.71 Plaintiff summarizes his "Guaranty Clause Claims" at 12 Record 81-89:

"At 10 Record 329 plaintiff notes:

> 'Plaintiff is invoking the Guaranty Clause in Halliwell v. Eu rather than confining his claims to the well-developed federal protection of voting rights under the Equal Protection Clause of the Fourteenth Amendment and the protection of political association under the First Amendment made applicable to the states by the

> Due Process Clause of the Fourteenth Amendment because of the unprecedented scope of the violations of voting rights in Halliwell v. Eu. The California Supreme Court has gone far beyond permitting the unequal treatment of minorities and has indulged in subterfuges which have the effect of a sustained frontal assault on California's institutions of representative democracy.'

At 4 Record 211 plaintiff observed:

> 'Whatever might be said of other threats to a republican form of government such as armed insurrection, the authority and the obligation of the federal courts to enforce the Guaranty Clause

is clear when the republican character of a state's legislature and congressional delegation is gravely threatened by judicial usurpation of power.'

"As plaintiff has noted at 10 Record 320:

'Any notion that the Guaranty Clause of Article IV § 4 is a dead letter simply because it has never been successfully invoked runs contrary to the explicit provisions of Article III § 2(1): "The judicial power shall extend to all cases, in law and equity, arising under this Constitution. . . ." There may be some Guaranty Clause claims which are nonjusticiable: "As we stated in Baker v. Carr some questions raised under the

Guaranty Clause are nonjusticiable, where 'political' in nature and where there is a clear absence of judicially manageable standards." Reynolds v. Sims (1964) 377 U.S. 533, 582. But there are no nonjusticiable portions of the U.S. Constitution.

> "It cannot be presumed that any clause in the Constitution is intended to be without effect . . . It is emphatically the province and duty of the judicial department to say what the law is . . . [If courts] close their eyes on the Constitution . . . if the legislature shall do what is expressly forbidden

> . . . a written constitution is reduced to nothing. . . ." Marbury v. Madison (1803) 5 U.S. 137, 174, 177-178.'

"At 10 Record 330 plaintiff has noted that

> 'although prior plaintiffs have always lost on the merits when they have attempted to invoke the Guaranty Clause, their claims were trivial in comparison to the Guaranty Clause aspects of Halliwell v. Eu. Dismissing a claim as jurisdictionally insubstantial, the U.S. Supreme Court nevertheless affirmed in Pacific Telephone Co. v. Oregon (1912) 223 U.S. 118, 150 its "everpresent duty whenever it becomes necessary in a controversy properly

> submitted to enforce and uphold the applicable provisions of the Constitution as to each and every exercise of governmental power."'

"Plaintiff has certainly defined his Guaranty Clause claims in terms of judicially manageable standards as required for Guaranty Clause claims by Baker v. Carr supra and Reynolds v. Sims supra. As plaintiff has noted at 4 Record 206,

> 'It is precisely because the right to cast a meaningful vote is so fundamental that the abrogation of the referendum powers of the people of California is a serious abridgement of a republican form of government. This is all the more so because the subject matter of the referendum was central to the

> political process itself. At one stroke the California Supreme Court took from the people the control of their institutions of representative democracy, insofar as these determine the makeup of California's state legislature and congressional delegation.'

For further details regarding the abrogation of the initiative and referendum provisions of California's Constitution see 10 Record 292-319, 342-350.

"At 4 Record 209-210 plaintiff observed:

> 'In mandating the adoption of redistricting plans which have been blocked by referendum the California Supreme Court has violated the primary attribute of republican government

set forth in Chisholm v. Georgia (1793) [2 U.S. 419, 457]: "one constructed on the principle that supreme power resides in the body of the people." In ignoring the constitutional defects of the redistricting plans which it orders into effect the California Supreme Court has brazenly transgressed the principles of the rule of law set forth in Marbury v. Madison (1803) [5 U.S. 137, 178]. The majority of the court has indeed "closed their eyes on the Constitution," but instead of seeing only the law the majority has seen only deference to a Legislature and a Governor of their own party. The majority of the Court has indeed "subverted the very

foundation of all written constitutions" and allowed "the legislature to do what is expressly forbidden" in Article XXI, "notwithstanding the express prohibitions of Article II sections 9 and 10. In making the partisan gerrymandering of California's legislative districts "in reality effectual" the majority of the Court has "given to the legislature a practical and real omnipotence."'

"As plaintiff noted at 5 Record 281-283:

'Proponents of redistricting reform in California have done everything possible to preserve their political rights. The passage of Proposition 6, which became Article XXI, was followed by the investment of one million dollars and untold effort to

develop thoroughly documented redistricting plans which implement Article XXI and to defend these plans at public hearings. The effort continued with a very thorough analysis of the Legislature's redistricting plans which demonstrated their blatant unconstitutionality and challenges to these plans which were presented to the California Supreme Court. The effort to see that Article XXI of the State Constitution was honored even though the Legislature's redistricting plans ignored it also included a massive petition drive which secured 2 1/2 times the necessary number of signatures needed to block the Legislature's plans til they had been approved by a

referendum. The State Supreme Court overruled the State Constitution by ordering into effect these districts which had thus been blocked. . . .

'The voters of California resoundingly rejected these districts in the referendum. Thus though every political avenue was exhausted and the reformers clearly won according to the established rules, the California Supreme Court decision robbed the reformers of their victory. They turned to the federal courts for redress; but in all of these federal suits consideration of the merits has been totally avoided.

'The last line of defense for the rule of law is the

> Guaranty Clause of the United States Constitution. It is of critical importance that the United States Supreme Court clearly draw a line that demarcates tolerance of political usurpation from comity and federalism. The scandalous circumstances set forth in the Record of this case demonstrate that the U.S. Supreme Court could hardly wish to await an even more severe breakdown in constitutional government before reaffirming that the Guaranty Clause does indeed protect a state's institutions of representative democracy.'

"In Volume 9 of the Case Record plaintiff documents further damage to California's institutions of

representative democracy arising from the abrogation of the initiative provisions of the California Constitution by the California Supreme Court in Legislature v. Deukmejian (1983) 669 P.2d 17. In Legislature v. Deukmejian the court invented out of whole cloth a constitutional limitation on the right to redistrict by initiative, refused to adjudicate a challenge to the constitutionality of the redistricting plans whose 'presumptive validity' allegedly precluded the Sebastiani redistricting initiative (Contra: Kramer v. Union School District (1969) 395 U.S. 621, 628), and cancelled the scheduled election on this initiative on the grounds of cost (Contra: Bullock v. Carter (1972) 405 U.S. 134, 143). At 9 Record 184-185 plaintiff demonstrated how this violated the essential requirements of

a republican form of government.

'In Chisholm v. Georgia [2 U.S. at 448, 457], the U.S. Supreme Court provides a short definition of republican government as "one bound by the laws -- [and] constructed on this principle, that the supreme power resides in the body of the people." Or in the words of the California Constitution, Art. II § 1, "All political power is inherent in the people. Government is instituted for their protection, security and benefit, and they have the right to alter or reform it when the public good may require." Also, as the U.S. Supreme Court notes in Hurtado v. People of California [110 U. S. at 535]:

> "Due process of law . . . [protects] those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure." Emphasis added.
>
> As the California Constitution also says, "The people have the right to instruct their representatives" (Art. I § 3) -- not the other way around.'

"At 11 Record 593-595 plaintiff has summarized the severe damage which has been inflicted on California's institutions of representative democracy:

'The Democratic Party has declared all-out war on the State Constitution to protect its redistricting. . . . So far in this all-out war the Democratic Party, with the support of its top officials in executive, legislative and judicial branches of California's state government, has abrogated (1) the initiative of Article II § 8, (2) the referendum of Article II §§ 9 and 10, (3) the anti-gerrymandering protections of Article XXI, (4) the requirement of Article IV § 6 that "Each senatorial district shall choose one senator," (5) the provision of Article I § 3 that "The people have the right

> to instruct their representatives", (6) the provision of Article II § 1 that "All political power is inherent in the people . . . they have the right to alter or reform it when the public good may require." and impaired numerous other provisions of the California Constitution.
>
> 'In these circumstances the Guaranty Clause of Article IV § 4 of the United States Constitution is clearly applicable.'

"As plaintiff has noted at 7 Record 110-111, Van Sickle v. Shanahan (1973) Kansas, 511 P.2d 223 provides the most thorough analysis of Guaranty Clause caselaw since Reynolds v. Sims (1964) 377 U.S. 533, 584 affirmed that only some Guaranty Clause claims are

nonjusticiable. Van Sickle clearly supports a thorough briefing by parties on this aspect of plaintiff's case:

> 'The contention that all cases arising under the guarantee clause, Article IV, Section 4, of the United States Constitution, are nonjusticiable, has no historical precedent. As in other cases wherein the 'political' controversy bar to judicial enforcement has been raised, courts must look to the facts and circumstances surrounding the litigation, as well as the theory upon which the constitutional challenge is premised, to ascertain whether the issue may be resolved by the judicial process.' Van Sickle, supra, at 224-225."

#089 EROSION OF POLITICAL LEGITIMACY

089.05 Plaintiff contends at 1 Record 6: "The primary aggrieved party when elections are not constitutionally conducted is not 'real parties of interest' such as Democrats or Republicans nor incumbent congressmen and state legislators, but the general public, who are deprived of the one right of citizenship without which defense of any and all other rights may be impossible."

089.09 Plaintiff argued on February 19, 1982 at 1 Record 17:

"By reason of the gross violation and abrogation of provisions of California and federal constitutions . . . California citizens . . . face the prospect of legislative elections in unconstitutionally gerrymandered districts. Elections conducted in such districts will do irreparable damage to the legitimacy of legisla-

tors elected from them and will also do irreparable injury to public confidence in the fairness of political institutions."

089.21 Plaintiff contends at 1 Record 50: "The abuse of political power tends to become more extreme as previous examples appear to validate the practices involved. In this instance, the partisan favoritism previously shown in the sensitive tasks involved in the conduct of elections by officials of the opposition party is readily cited as justification for tilting the scales in the other direction . . . ."

089.27 Plaintiff contends at 1 Record 242: "The injury faced by Plaintiff and other California voters is not only the defeat of candidates who might effectively represent their interests in government; more important is potential damage to the

fabric of government itself. Elections conducted in gerrymandered districts will do irreparable damage to the legitimacy of legislators elected from them. If the contrivances which imposed these districts are allowed to succeed, public confidence in the fairness of the political process in California will suffer severely."

089.29 Plaintiff contends at 1 Record 242: "The strain on our democratic institutions is most severe in times of economic distress and when many are losing faith in the effectiveness of government. . . . To destroy faith in the fairness of legislative elections at such a time can have consequences ranging from a sharp decline in electoral participation (which enhances the power of special interests) to civil insurrection which produces a backlash that threatens basic freedoms."

089.41 Plaintiff contends at 3 Record 299-300:

"The restrictions on the gerrymandering of legislative districts which are contained in Article XXI of the California Constitution were not put there because equally populated, continguous groupings of whole counties and cities look more aesthetic on a map than districts which violate these requirements, but because stringing segments of various political subdivisions can give one party a majority of the legislative seats while its opposition wins a majority of the votes. Of even more importance is the fact that widely separated clusters of voters that have only their partisan identification in common do not make the sort of cohesive entity that allows people to hold their representatives accountable. Moreover, when people

have little or no opportunity to 'throw the rascals out' they are likely to lose faith in their system of government. The Weimar Republic failed because of a system of proportional representation that kept most of the seats perpetually in the hands of a group of insiders in each of the political parties, and this same sort of situation can arise when a state is carved into safe Democratic and Republican districts skillfully tailored for specific candidates."

089.61 Plaintiff contends at 3 Record 216:

"Plaintiff has urgently pleaded with the [California] Supreme Court [see 3 Record 95-96] to reconsider its decision and thereby preserve what remains of public confidence in the fairness of the California political

system:

> 'The court surely must be aware of the effect on public confidence in the fairness of the conduct of elections if a predominantly Democratic court should order into effect manifestly pro-Democratic reapportionment plans without even holding a hearing on the constitutionality of such plans. The strain on our democratic institutions is most severe in times of economic distress and when many are losing faith in the effectiveness of government. Democracy survives only to the extent that losers accept electoral mandates that adversely affect their lives. It is apparent to knowledgeable observers that no matter what

> political course we take a great many will have bitter pills to swallow. To destroy faith in the fairness of legislative elections at such a time can have consequences ranging from a sharp decline in electoral participation (which enhances the power of special interests) to civil insurrection which produces a backlash that threatens basic freedoms.'

"The court has turned a deaf ear to this and all other pleas for reconsideration."

089.81 Plaintiff contends at 3 Record 219:

"Failure to enforce some constitutional requirements, abrogation of other constitutional provisions, the interpretation of still others in a manner

diametrically opposed to their plain meaning and numerous denials of due process of law are in themselves serious abridgments of a republican form of government. When every one of these actions favors the party in power against its major opposition a grave threat exists to the institutions of representative democracy.

"If government of the people, by the people and for the people does indeed perish in this country it is unlikely that this will happen as a result of a military coup against a government which the citizens consider to have been fairly elected. It is much more likely that the legitimacy of our elected officials will first be destroyed by a series of actions such as have taken place in this case."

#185 GUARANTY CLAUSE IMPLICATIONS

185.11 Plaintiff contends at 4 Record 220-221:

"The Order of [July 1, 1982] dismisses without leave to amend plaintiff's claims which are primarily based on Article IV § 4 on the grounds that 'This court lacks jurisdiction over the subject matter of Guaranty Clause claims.' This ruling is not consistent with the position of the Court in Baker v. Carr, where every justice recognized that Guaranty Clause claims 'arise under the Constitution' and are therefore within the jurisdiction of the courts. The problem with many Guaranty Clause claims is justiciability; in this regard the Baker court noted, [369 U.S. at 198]

> 'In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather,

> the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded.'

The matter of justiciability of plaintiff's Guaranty Clause claims is addressed [at 4 Record 198-211]."

185.21 Plaintiff contends at 4 Record 202-203:

"In most previous Guaranty Clause cases some peripheral aspect of state government has been involved, but where an alleged usurpation of power has involved control of a state government itself judicial misconduct has never been a factor. Even so, there are ample precedents defining republican government with

sufficient precision to permit evaluation of the merits of the Guaranty Clause claim presented in this case.

"These precedents date from the earliest years of the republic. In Chisholm v. Georgia (1793) 2 U.S. 419 the Supreme Court defines the essential elements of a republican form of government:

> 'The people of the State created, the people of the state can only change, its Constitution. Upon this power there is no other limitation but that imposed by the Constitution of the United States: that it must be of the Republican form.' Id. at 448.

A state, as much as its citizens, is 'bound by the laws' even though the state is sovereign; willful refusal to

discharge legal obligations by an individual or by the state are both 'amenable to a Court of Justice.' Id. at 456.

> 'As a citizen, I know the Government of that state to be republican; and my short definition of such a Government is, -- one constructed on this principle, that the Supreme Power resides in the body of the people.' Id. at 457."

185.29 Plaintiff contends at 4 Record 203-205:

"The rule of law component of a republican form of government, especially the judicial obligation to uphold written constitutions, is defined in Marbury v. Madison (1803) 5 U.S. 137:

> '[T]he particular phraseology of the Constitution of the

United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.' Id. at 180. (Italics in original.) '[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded . . . .

'The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws

furnish no remedy for the violation of a vested legal right.' Id. at 163.

'It cannot be presumed that any clause in the Constitution is intended to be without effect and, therefore, such a construction is inadmissible unless the words require it.' Id. at 174.

'It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.' Id. at 177.

'[If courts] close their eyes on the Constitution, and see only the law . . . [and] if the legislature shall do what is expressly forbidden, such act, notwithstanding the express pro-

> hibition, is in reality effectual . . . . [Such an act] thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution; [this] would of itself be sufficient in America, where written constitutions have been viewed with so much reverence, for [its rejection].' Id. at 178.

In refusing to even consider the conformity with applicable constitutional standards of the legislative districts ordered into effect as its own court-mandated redistricting plans the California Supreme Court has flouted the raison d'etre of an independent judiciary as defined in caselaw dating from the inception of this republic."

185.35 Plaintiff contends at 4 Record 209-210:

"In mandating the adoption of redistricting plans which have been blocked by referendum the California Supreme Court has violated the primary attribute of republican government set forth in Chisholm v. Georgia (1793): 'One constructed on the principle that Supreme Power resides in the body of the people.' In ignoring the constitutional defects of the redistricting plans which it orders into effect the California Supreme Court has brazenly transgressed the principles of the rule of law set forth in Marbury v. Madison (1803). The majority of the court has indeed 'closed their eyes on the Constitution,' but instead of seeing only the law the majority has seen only deference to a Legislature and a Governor of their own political party. The majority of the Court has

indeed 'subverted the very foundation of all written constitutions' and allowed 'the legislature to do what is expressly forbidden' in Article XXI, 'notwithstanding the express prohibitions' of Article II Sections 9 and 10. In making the partisan gerrymandering of California's legislative districts 'in reality effectual' the majority of the Court has 'given to the legislature a practical and real omnipotence.'"

185.51 Plaintiff contends at 8 Record 298-300:

"Unlike plaintiff's partisan gerrymandering claims, plaintiff's Guaranty Clause claims do not rely on judicially manageable standards suggested to this Court as logical extensions of standards used in other types of cases. Plaintiff's Guaranty Clause claims rely on explicit definitions of the essential

elements of republican government affirmed as such by the United States Supreme Court. In Minor v. Happersett (1874) 88 U.S. 162, 176-177 the Court used the original 13 states and states subsequently admitted to the Union to define what were the essential attributes of a republican form of government. See 4 Record 167.

"This standard is further defined by In re Duncan (1891) 139 U.S. 449, 461:

> 'By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed

in representative bodies, whose legitimate acts may be said to be those of the people themselves; but while the people are thus the source of political power, their governments, national and state, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities.' See 4 Record 167-168.

"In Chisholm v. Georgia (1973) 2 U.S. 419, 457 the Court embraces a short definition of republican government: 'one constructed on this principle, that the Supreme power resides in the body of the people.' See 4 Record 202-203. In the wellspring of judicial review, Marbury v. Madison (1803) 5 U. S. 137 Chief Justice Marshall writes:

'The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.' Id. at 163. See 4 Record 203-205.

"In Yick Wo v. Hopkins (1886) 118 U.S. 356, 370 the Supreme Court recognizes voting rights as the most fundamental legal rights because they are preservative of all other rights. See 4 Record 205-206. In United States v. Cruikshank (1875) 92 U.S. 542 the Court notes: 'The very idea of a government, republican in form, implies a right on the part of its citizens to . . . petition for a redress of grievances.' Id. at 552.

'The equality of rights of

citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle if within its power.' Id. at 555. See 4 Record 206-207.

"The fact that all recent political rights cases which have reached the U.S. Supreme Court have been decided on Fourteenth Amendment rather than Guaranty Clause grounds is simply a reflection of the fact that a state's institutions of representative democracy are seldom given so crippling a blow as has been dealt to California -- and it was dealt by the state's supreme court, in Assembly v. Deukmejian."

185.61 Plaintiff contends at 10 Record 329-331:

"Plaintiff is invoking the Guaranty Clause in Halliwell v. Eu rather than confining his claims to the well-developed federal protection of voting rights under the Equal Protection Clause of the Fourteenth Amendment and the Protection of Political Association under the First Amendment made applicable to the states by the Due Process Clause of the Fourteenth Amendment because of the unprecedented scope of the violations of voting rights in Halliwell v. Eu. The California Supreme Court has gone far beyond permitting the unequal treatment of minorities and has indulged in subterfuges which have the effect of a sustained frontal assault on California's institutions of representative democracy.

"In destroying effective popular sovereignty in California the Democratic members of the California Supreme Court have come into direct conflict with

Chisholm v. Georgia (1793) 2 U.S. 419, 457, where the court provides a 'short definition of [republican] Government [, which] is -- one constructed on this principle, that the supreme power resides in the body of the people.' The California Supreme Court has also evaded the other guardian of republican government, the ultimate authority of a written constitution.

> 'By the Constitution, a republican form of government is guaranteed to every state in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be

> said to be those of the people themselves; but while the people are thus the source of political power, their governments, national and state, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities.' In re Duncan (1891) 139 U.S. 449, 461.

"Thus although prior plaintiffs have always lost on the merits when they have attempted to invoke the Guaranty Clause, their claims were trivial in comparison to the Guaranty Clause aspects of Halliwell v. Eu. Dismissing a claim as jurisdictionally insubstantial, the U.S. Supreme Court nevertheless affirmed in Pacific Telephone Co. v. Oregon (1912) 223 U.S. 118,

150 its 'everpresent duty whenever it becomes necessary in a controversy properly submitted to enforce and uphold the applicable provisions of the Constitution as to each and every exercise of governmental power.'

> 'Courts should not gradually emasculate or whittle away the beneficent provisions of the supreme law. Constitutional provisions, protective and remedial in their nature, are not to be construed so stringently as to defeat the intended protection or remedy. Such regulatory provisions deemed to be of sufficient importance to the welfare of our government as to be incorporated in our constitution, must be interpreted to accomplish effectively and comprehensively the purposes for

which they were introduced.'
Wilentz v. Hendrickson (1943)
New Jersey, 33 A.2d 366, 389."

185.71 Plaintiff contends at 5 Record 280-283:

"Those few suits invoking the Guaranty Clause which the Supreme Court has considered (see 4 Record 156-197) have involved matters that are trivial in comparison to the collaborative usurpation of power by elected officials which, as this suit documents, has precluded the constitutional election of a state's legislature and congressional delegation (see 4 Record 198-211). In VanSickle v. Shanahan (1973) 511 P.2d 223, 231-234 the Supreme Court of Kansas summarizes the most important Guaranty Clause precedents (see 5 Record 90-97) and concludes that:

'This court, having carefully

> reviewed the cases cited by the appellee, has concluded the contention all cases arising under the guaranty clause are nonjusticiable has no historical precedent. Instead, as in other cases wherein the "political" controversy bar to judicial enforcement has been raised, we must look to the facts and circumstances surrounding the litigation, as well as the theory upon which the constitutional challenge is premised, to ascertain whether the issue may be resolved by the judicial process.' Id. at 234.

"Proponents of redistricting reform in California have done everything possible to preserve their political rights. The passage of Proposition 6, which became Article XXI, was followed

by the investment of one million dollars and untold effort to develop thoroughly documented redistricting plans which implement Article XXI and to defend these plans at public hearings. The effort continued with a very thorough analysis of the Legislature's redistricting plans which demonstrated their blatant unconstitutionality and challenges to these plans which were presented to the California Supreme Court. The effort to see that Article XXI of the State Constitution was honored even though the Legislature's redistricting plans ignored it also included a massive petition drive which secured 2 1/2 times the necessary number of signatures needed to block the Legislature's plans til they had been approved by a referendum. The State Supreme Court overruled the State Constitution by ordering into effect these districts which had thus been

blocked.

"In a much less serious challenge to the power of referendum than in the case at bar the Supreme Court of Colorado ruled:

> 'Amendment No. 9, the recipient of the greatest popular support, will be given effect as the expression of the predominant will of the people . . . .
>
> 'This interpretation is not only consistent with the legislative mandate and in furtherance of the principles of initiative and referendum, it is the only interpretation that is consistent with Article IV, Section 4 of the United States Constitution. That section, which guarantees "to every State in this Union a Republican Form of

Government," must, at the very least, mean that "supreme power resides in the body of the people." Chisholm v. Georgia 2 U. S. (2 Dall.) 419, 457 1 L.Ed. 440. Therefore, since popular sovereignty and concepts of republicanism are inextricably bound together, and since Amendment No. 9 is the clearest expression of the former, it must, consistent with the most fundamental principles of the Federal Constitution, prevail.' In re Interrogatories Propounded by Senate, Etc. (1975) Colorado 536 P.2d 308, 314-315.

"The voters of California resoundingly rejected these districts in the referendum. Thus though every political avenue was exhausted and the reformers clearly won according to the

established rules, the California Supreme Court decision robbed the reformers of their victory. They turned to the federal courts for redress; but in all of these federal suits consideration of the merits has been totally avoided.

"The last line of defense for the rule of law is the Guaranty Clause of the United States Constitution. It is of critical importance that the United States Supreme Court clearly draw a line that demarcates tolerance of political usurpation from comity and federalism. The scandalous circumstances set forth in the Record of this case demonstrate that the U.S. Supreme Court could hardly wish to await an even more severe breakdown in constitutional government before reaffirming that the Guaranty Clause does indeed protect a state's institutions of representative democracy."

#524 THIS ACTION IS MOOT.

524.12 Judge Karlton ruled on May 4, 1982 at 3 Record 43:

"It now appears that the plaintiff may still obtain a legally efficacious remedy should he prevail on the merits of this action after this court disposes of the motions brought on pursuant to this order. Resolution of all other matters is therefore deferred pending the court's disposition of [defendant's] motions."

524.22 Defendant contends at 7 Record 41:

"Defendant Secretary of State asserts that plaintiff has no live dispute remaining with her now that the 1982 primary and general election has been held.

"With no live issue remaining to be resolved, defendant Secretary of

State submits that as a matter of law, she is entitled to judgment."

524.32 The Assembly contends at 8 Record 13:

"The California Legislature, pursuant to the mandate of the electorate, see Statement of the Case, [8 Record 6], adopted a new reapportionment plan in December 1982. That plan has been signed into law, 1983 Cal. Stats. First Extraordinary Session, Chapter 8, and supercedes the reapportionment plan at issue in this case. See Order, February 8, 1983, [7 Record 525:23-27]. Even if there were some legal basis for invalidating the Assembly reapportionment plan used in 1982, the appropriate remedy would be an order insuring that no further elections be conducted under it. See Reynolds v. Sims, supra, 377 U.S. at 585; Maryland Committee v. Tawes,

377 U.S. 656, 675-76 (1964). Because the California Legislature has already taken that step, any such order by the Court here would be an empty gesture."

524.42a The Senate contends at 7 Record 20:

"This Court lacks subject matter jurisdiction as this action is moot. Plaintiff challenges the action of the California Supreme Court in Assembly v. Deukmejian (1982) 30 Cal.3d 638, in the adoption of temporary court ordered reapportionment plans for the 1982 elections only. See, Assembly v. Deukmejian (1982) 30 Cal.3d 638. The 1982 California primary and general elections have been held. A statute reapportioning the Senate Districts for the 1984 elections is presently in effect. The Senate requests that this Court take judicial notice of the 1983 reapportionment stat-

ute."

524.42b Plaintiff replies to the Senate at 7 Record 336-337:

"The position of the Senate before the June primary was that 'Plaintiff's challenge of the legislative redistricting statutes is not ripe inasmuch as the statutes are not in effect' (3 Record 16). The position of the Assembly was that 'In the event the electorate rejects the statutory reapportionment plan, there will be no need for action by this court. The issue will be moot.' (3 Record 247.) After the primary the Senate asserted: 'This court may dismiss this action on the grounds of equity [since] any relief which plaintiff seeks clearly and unequivocably would disrupt California's electoral process.' (4 Record 110.) Now the Senate's position is that 'this action

is moot.' While there is some disagreement on the dividing lines between ripeness, inequitable interference with the electoral process and mootness, the Legislature seems to be united in its belief that it need never be held accountable for its action in a court of law."

524.51 Plaintiff quotes the following colloquy from the February 16, 1983 hearing at 13 Record 221-223:

"Judge Karlton: . . . Are you telling me that by virtue of the Legislature's adoption of a new reapportionment plan, which will guide the '84 election this case is rendered moot; is that what you are trying to say?

"Ms. Ferguson [Senate counsel]: Yes.

"Judge Karlton: Wait. Are there people presently serving in the

state senate who were elected pursuant to the supreme court's plan?

"Ms. Ferguson: Yes, Your Honor.

"Judge Karlton: That's moot? Are there people who meet Mr. Halliwell's assertion that they were deprived of an opportunity to vote in the present structure of the Senate by virtue of the renumbering?

"Ms. Ferguson: The election rendered it moot, Your Honor.

"Judge Karlton: Ma'am, answer my question. Mr. Halliwell says that by virtue of the plan adopted by the Senate, certain persons were, in effect, disenfranchised; is that true?

"Ms. Ferguson: For the '82 elections?

"Judge Karlton: Yes, what's moot?

"Ms. Ferguson: Okay. The statute was never in effect. The '82

statutes were never in effect. Legislative statutes were never in effect.

"Judge Karlton: I understand. [But he's] challenging the plan adopted by the Supreme Court, and the people elected under it are serving right now. What is moot? Mr. Halliwell says there are people who have been unconstitutionally deprived right now. Tell me how could that be moot?

"Ms. Ferguson: Well, Your Honor, is it not the test on mootness following elections capable of repetition [but evading] review?

"Judge Kennedy: Mr. Halliwell is not, I'm sure concerned ultimately with how the state injury arose, whether it was a redistricting plan foisted upon him by the Supreme Court of the State of California or the Senate and the Assembly acting together. He is arguing about representation so federal constitutional

claims generally cannot be avoided by simply saying that a decision has been reached or a statute has been enacted or there is some new statute. As far as he's concerned, it's an ongoing injury that's properly alleged in the complaint. I should think.

". . . .

"Judge Karlton: The question is, when you talk about mootness, you are talking about whether there is a live controversy before the court. There are folks sitting there, Mr. Halliwell claims, sitting there pursuant to an unconstitutional process. Now is that claim moot, and if so, why?

"Ms. Ferguson: Your Honor, I can only repeat what I have said." Hearing transcript at 31-34.

524.62 The Senate argued on July 19, 1984 at 13 Record 423-424:

"Plaintiff Is Not Entitled To Reconsideration.

"Again, it must be reiterated that plaintiff asserts no basis for the requested reversal of this Court's previous ruling other than his own conviction that this Court has misapplied applicable precedent. Plaintiff has identified no new facts which would justify reconsideration; now has he unearthed any new judicial decision which might even tangentially impact upon the issues previously adjudicated by this Court. As a result, the reasoning of the Court, as set forth in the Order of March 27, remaind dispositive and is sufficient to defeat the instant motion.

"In ruling that plaintiff had not, and could not, assert claims upon which relief could be granted with regard to the Court-ordered reapportion-

ment of California's Senate Districts, this Court noted that the reapportionment plan ordered into effect by the California Supreme Court and challenged by plaintiff has been superseded by a subsequent reapportionment statute enacted by the Legislature and signed into law by the Governor. (Order of March 27, at [12 Record 24:6-12, 245: 23-25].) The Court thus found that even had plaintiff been able to identify constitutional defects in the Court-ordered reapportionment plan, prospective relief designed to remedy such defects would be unnecessary and perhaps even counter-productive since the districts implemented by the California Supreme Court would soon be phased out of existence and replaced by the districts as constructed by the subsequently enacted reapportionment plan."

524.82 Defendant contends at 12 Record 459-460:

"As a result [of the rejection of A.B. 301 by referendum], the Legislature enacted new congressional redistricting plans to be used in 1984 and in subsequent years. Stats. 1983, Chapter 6. Consequently, the congressional districts plaintiff seeks to challenge in this action will not be used in the 1984 or any subsequent elections. See also, Order of this court, July 1, 1982 [4 Record 41], lines 14-17. Accordingly, there is no present case or controversy raised by the complaint in this action regarding the congressional districts California is currently using or is scheduled to use during the remainder of this decade.

"Plaintiff obviously disfavors the districts created by A.B. 301. Apparently, his disfavor was shared by

other Californians who exercised their franchise to vote the plan down in the 1982 [primary] election. Having succeeded in so doing, they need no further prospective relief, which was effectively mooted by the successful referendum campaign against the plan. No prospective relief with regard to the obsolete districts is required or permissible in this case."

524.83 Plaintiff contends at 14 Record 53-54:

"Even though the 1982 elections have indeed passed into history, mootness provides no basis for refusing to supply the data requested here. In County of Los Angeles v. Davis (1979) 440 U.S. 625, 631 the U.S. Supreme Court notes that

'The burden of demonstrating mootness "is a heavy one."

> See United States v. W.T. Grant Co. [345 U.S. 629] at 632-633.'

The Court lays down two conditions both of which must be satisfied in order for a case to become moot:

> '(1) it can be said with assurance that "there is no reasonable expectation . . . "that the alleged violation will recur, see [W.T. Grant supra] at 633, see also SEC v. Medical Committee For Human Rights, 404 U.S. 403 (1972), and
>
> '(2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. See, e.g. De Funis v. Odegaard, 412 U.S. 312 (1974); Indiana Employment Security Div. v. Burney, 409 U.S. 540 (1973).' Id.

In Whitcomb v. Chavis (1971) 403 U.S.

124, 140-141 the Court found that enactment of a new redistricting plan which eliminated the original grievance but which had not yet been found constitutional did not moot the challenge to the prior plan since if the new plan were invalidated 'the issues involved in the present litigation would simply reappear for decision.' Whitcomb thus reaffirms the heavy burden borne by those seeking to establish mootness: it must be clear that the policies challenged as unconstitutional will not re-emerge in a new guise. Clearly if a new redistricting plan perpetuates the challenged grievances the same issues do indeed 'reappear for decision' and a finding of mootness is wholly inappropriate."

524.84 Judges Kennedy, Karlton and Ramirez rule in the order of

July 9, 1985 at 15 Record 201-202:

"All parties appear to concede that the [A.B. 301] plan is no longer in operation because it was defeated in a referendum election by the voters of California. Nor is the Supreme Court plan in operation, the legislature having adopted a new plan. This is, therefore, not a case of the defendant voluntarily ceasing its conduct as the result of the lawsuit; it was the action of other persons, not party to the litigation, which mandated the cessation of the challenged conduct. See Iron Arrow, 104 S. Ct. at 375-76 (concerning voluntary acts of third-parties as sufficient to cause a case to become moot)."

524.85 Plaintiff contends at 15 Record 251-253:

"The Order of July 9, 1985 [at 15 Record

201-202] cites Iron Arrow Honor Society v. Heckler (1983) 104 S.Ct. 373, 375-375 in an attempt to find a basis for mootness because:

> 'All parties appear to concede that the [A.B. 301] plan is no longer in operation because it was defeated in a referendum election by the voters of California. Nor is the Supreme Court plan in operation, the Legislature having adopted a new plan. This is, therefore, not a case of the defendant voluntarily ceasing its conduct as the result of the lawsuit; it was the action of other persons, not party to the litigation, which mandated the cessation of the challenged conduct.' Order at [15 Record 201]:19-26.

However, Iron Arrow is inapplicable for several reasons, most notably because that opinion stresses the independence of the University's action quite apart from any regulatory action by defendant Heckler. The syllabus of the opinion (104 S.Ct. at 373) states:

> 'All-male honorary organization brought action seeking declaratory and injunctive relief to prevent the Secretary of Health and Human Services from interpreting a regulation so as to require a private university to ban it from campus.'

The Court's opinion notes:

> 'The Trustee Executive Committee had adopted that position on July 15, 1980, determining that Iron Arrow may return to campus only if it satisfies the code for

> all student organizations, a code which includes a policy of non-discrimination. The President's letter moreover informed Iron Arrow that the University would maintain that position, regardless of the outcome of Iron Arrow's lawsuit. Specifically, the letter stated that "The question is not only what the law requires. The most important question is what our University should do, in fairness to all students, whether the law requires it or not." (Emphasis in original.)'

In Halliwell v. Eu Plaintiff has stressed from the outset and provided frequent demonstrations of the fact that the contested districts and their essentially unchanged successors were imposed by means of political collusion of Demo-

cratic officials in the legislative, executive and judicial branches of government.

Moreover, Iron Arrow (104 S.Ct. at 375) stresses that there must be a 'discontinuance of challenged activities' and that 'there is no reasonable likelihood that the wrong will be repeated.' Perpetuating the grievances challenged in a lawsuit, as the new districts unequivocally do, completely destroys any support for a finding of mootness that might be gleaned from Iron Arrow supra. This is especially so since the A.B. 301 plan is the very plan adopted by the California Supreme Court, so when the Legislature (both houses of which are defendants in this lawsuit) replaced the court-ordered plan it was simply replacing a plan which it had originated."

#525 SIMILARITY OF THE 1983 DISTRICTS

525.11 Plaintiff contends at 3 Record 345:

"Even if the Legislature should enact new redistricting plans following the rejection of the contested districts this case still will not be moot. As Wright & Miller, Federal Practice and Procedure notes in § 3533 (pp. 278-279),

> 'Passage of new legislation that does not satisfy the principles urged in attacking old legislation similarly does not moot the attack. A particularly rich example is provided by Bullock v. Carter (1972) 405 U.S. 134. After a three-judge court enjoined enforcement of Texas election filing fees, the legislature enacted a contingent, temporary statute. . . .

Since the original injunction would run beyond expiration of the temporary legislation, it was easily concluded that the case had not become moot. Any other conclusion would have created a superb method for resistant legislatures to avoid Supreme Court review. [Citation.]."

525.31 Plaintiff contends at 7 Record 338-339:

"Wright & Miller's Federal Practice and Procedures § 3533 discusses the U.S. Supreme Court's ruling in United States v. W. T. Grant Company (1953) 345 U.S. 629:

'In order to establish mootness, the Court wrote, the defendant who has discontinued challenged activities must carry

a heavy burden of demonstrating that there is no reasonable expectation that the wrong will be repeated.' Id. at 266-267.

Wright & Miller also notes:

'Emphasis on the usefulness of the remedies remaining available is entirely appropriate. The danger exists, however, that there may not be a sufficiently comprehensive examination of the ways in which apparently completed events may continue to have a present impact, or may involve a sufficient threat of recurrence to justify litigation because of the danger that future harm cannot be fully corrected. Injunctive or declaratory relief may often be desirable to eliminate the present consequences of

uncertainty, or to reduce the danger of recurrence.' Id. at 275.

In McLain v. Meier (1979) 612 F.2d 349, 355 the court of appeals affirmed a district court ruling that this ballot position case was not moot even though the election was over and the candidate who brought suit had no plans to run in a future election. Wright & Miller note that the McLain ruling is the normal procedure. '[T]here is little indication of any concern that the individual plaintiffs show specific plans that will bring them again in conflict with the challenged requirements.' Id. at 288.

"Wright & Miller also note: 'Passage of new legislation that does not satisfy the principles urged in attacking old legislation similarly does not moot the attack.' Id. at

278. They also note that 'challenges to election requirements have frequently been determined after the passage of the election immediately involved in the initial litigation.' Id. at 286."

525.51 Plaintiff contends at 9 Record 1:

"The action by the California Supreme Court in Legislature v. Deukmejian is simply the latest episode in a continuing conspiracy by Democratic officials in all branches of California government to force upon the people of California redistricting plans which are essentially the same as those which are the subject of Halliwell v. Eu. Substituting redistricting plans with minor modifications or using different tactics to impose these plans in no way deflects plaintiff's challenge to the constitutionality of the districts which

are the focus of controversy in Halliwell v. Eu. As Wright & Miller note in Federal Practice and Procedures § 3533, 'Passage of new legislation that does not satisfy the principles urged in attacking old legislation similarly does not moot the attack. . . . Any other conclusion would have created a superb method for resistant legislature to avoid Supreme Court review.'"

525.71 Plaintiff argues at 13 Record 21-23:

"Defendant notes [at 12 Record 459-460]:

> '[T]he Legislature enacted new congressional redistricting plans to be used in 1984 and in subsequent years. [Citation.] Consequently, the congressional districts

plaintiff seeks to challenge in this action will not be used in the 1984 or any subsequent elections. [Citation.] Accordingly, there is no present case or controversy raised by the complaint in this action regarding the congressional districts California is currently using or is scheduled to use during the remainder of this decade.'

"In Federal Practice and Procedures § 3533 Wright and Miller note:

'In order to establish mootness, the court wrote [in United States v. W.T. Grant Company (1953) 345 U.S. 629] the defendant who has discontinued challenged activities must carry a heavy burden of demonstrating that there is no reasonable

expectation that the wrong will be repeated.' Id. at 266-267. Plaintiff has documented at 10 Record 187-189, 10 Record 332-355, and 10 Record 171-176 the facts showing that the new congressional districts are essentially unchanged from those used in 1982 and that the minor changes which have been made have increased the population disparities among congressional districts. Wright and Miller supra also note:

> 'Passage of new legislation that does not satisfy the principles urged in attacking old legislation similarly does not moot the attack . . . . Any other conclusion would have created a superb method for resistant legislatures to avoid Supreme Court review.' Id. at 278-279.

'Challenges to election requirements have frequently been determined after the passage of the election immediately involved in the initial litigation.' Id. at 288-289.

"In American Party of Texas v. White (1974) 415 U.S. 767 the opinion notes:

'Although the November 1972 election has been completed and this court may not grant retrospective relief that would affect the outcome, this case is not moot. See Rosario v. Rockefeller, 410 U.S. 756 n. 5 (1973); see also Storer v. Brown, 415 U.S. at 737 n. 8.' Id. at 770 n. 1.

'Since it was a temporary measure, this primary financing

> legislation has expired and it has been replaced by new legislation. . . . The new legislation is also comparable to its predecessor [so the] . . . recent amendments to the 1972 . . . law have not mooted this controversy. . . . [I]n view of the special nature of election challenges in general and this short-term . . . measure in particular, we proceed to evaluate appellants' claims on the merits.' Id. at 791 n. 23."

525.72 Judges Kennedy, Karlton and Ramirez rule in the Order of July 9, 1985 at 15 Record 199: "Plaintiff in this case seeks to invalidate the court-ordered apportionment plan used in the 1982 Congressional elections. Since the 1982 elections

have passed, and a new apportionment plan has been in effect since the 1984 elections, it would appear that no relief can be granted to the plaintiff which would redress his alleged injuries."

525.73 Plaintiff contends at 15 Record 232-233:

"ANY FINDING OF MOOTNESS IS PRECLUDED BECAUSE THE CHALLENGED ACTIVITIES HAVE NOT CEASED.

"The Order of July 9, 1985 states at [15 Record 199]:17-22:

'Plaintiff in this case seeks to invalidate the court-ordered apportionment plan used in the 1982 congressional elections. Since the 1982 elections have passed, and a new apportionment plan has been in effect since the 1984 elections, it would

> appear that no relief can be granted to the Plaintiff which would redress his alleged injuries.'

This passage, and the entire Order, ignores the most fundamental aspect of any determination of mootness, whether the challenged activities have in fact ceased. The fact that the new districts perpetuate and indeed aggravate the flaws of the plan originally challenged by Plaintiff is stressed in his May 11, 1984 opposition to dismissal at 16:20-17:26 (13 Record 22-23):

> 'Plaintiff has documented at 10 Record 187-189, 10 Record 332-355, and 10 Record 171-176 the facts showing that the new congressional districts are essentially unchanged from those used in 1982 and that the minor changes which have been made

have increased the population disparities among congressional districts [approximately doubling the maximum disparity from 7,000 to 14,000]. Wright & Miller [in Federal Practice and Procedure § 3533] note:

> "Passage of new legislation that does not satisfy the principles urged in attacking old legislation similarly does not moot the attack . . . . Any other conclusion would have created a superb method for resistant legislatures to avoid Supreme Court review." Id. at 278-279 . . . .

'In American Party of Texas v. White (1974) 415 U.S. 767, the opinion notes:

> "Since it was a

temporary measure, this primary financing legislation has expired and it has been replaced by new legislation. . . . The new legislation is also comparable to its predecessor [so the] . . . recent amendments to the 1972 . . . law have not mooted this controversy. . . . [I]n view of the special nature of election challenges in general and this short-term . . . measure in particular, we proceed to evaluate appellants' claims on the merits." Id. at 791 n. 23.'"

525.74 Judges Kennedy, Karlton and Ramirez rule in the Order of July 9, 1985 at 15 Record 201:

"In this case, the exception would apply

if the challenged plan were still in force, but the election had already taken place. In such a case, the issues presented would "persist as the [plan is] applied in future elections." Storer, 415 U.S. at 737 n.8. As noted above, the matter at bar is not such a case since the plan is no longer in operation."

525.75 Plaintiff contends at 15 Record 233-235:

"The Order of July 9, 1985 states at [15 Record 201]:7-12:

> 'In this case, the exception [to mootness] would apply if the challenged plan were still in force, but the election had already taken place. In such a case, the issues represented would "persist as the [plan is] applied in future elections."

> Storer 415 U.S. at 737 n.8. As noted above, the matter at bar is not such a case since the plan is no longer in operation.'

However, the cited portion of Storer rejects this Court's position that facial alteration of the plan (by embodying very similar districts in new legislation) deflects a challenge to the underlying districts. As Plaintiff noted at 19:20-27 of his May 11, 1984 opposition to dismissal (13 Record 25):

> 'In Storer v. Brown (1974) 415 U.S. 724, 737, n. 8 the opinion notes, "The 'capable of repetition, yet evading review' doctrine, in the context of elections cases, is appropriate where there are 'as applied' challenges as well as in the more typical case involving only facial attacks." Storer also

> notes, "[adjudication] will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held."'

This doctrine is squarely applicable in the circumstances of an interim redistricting plan adopted when an election is close at hand, so according to Storer Plaintiff's challenge (filed on February 19, 1982 against districts to be used in the June and November 1982 elections) is clearly not moot.

"Moreover, even if there were no close similarity between the districts now in use and those originally challenged by Plaintiff, Democratic Party of the United States v. Wisconsin (1981) 450 U.S. 107, 115 n. 13, quoted by Plaintiff at 18:6-18 of his May 11,

1984 opposition to dismissal (13 Record 24), squarely rejects mootness for even a one-election court order:

> '"[E]ven if the order were clearly limited to the 1980 election year, the controversy would be properly before us as one 'capable of repetition, yet evading review.' Rosario v. Rockefeller, 410 U.S. 752, 756 n. 5 . . . ."'"

525.77 Plaintiff contends at 15 Record 235:

"The Order of July 9, 1985 [at 15 Record 199] cites NAACP, Western Region v. City of Richmond, 743 F.2d 1346, 1352-1353 (9th Cir. 1984) in support of mootness of Plaintiff's claims on account of 'a change of circumstances.' However, NAACP speaks of 'effects' and 'alleged violation' which must continue to exist

to avoid mootness -- not, as this Court seeks to imply, of a requirement that the vehicle causing an injury must remain unchanged:

> 'A case becomes moot when interim relief or events have eradicated the effects of the defendant's act or omission, and there is no reasonable expectation that the alleged violation will recur. [Citations.]' 743 F.2d at 1352-1353. Emphasis added."

#527 CONTINUING EFFECTS OF THE 1982 ELECTIONS PRECLUDE MOOTNESS.

527.21 Plaintiff contends at 7 Record 337:

"It is possible that at this stage of the proceedings plaintiff might be restricted by equitable considerations in terms of remedies that might be allowed, but his proposals for injunctions to require new elections clearly involve a live controversy and so are not mooted by the fact that the contested districts were used for the 1982 elections. Should this court rule that the districts used in the 1982 elections were constitutional or that they were unconstitutional but it would be unfair to elected candidates to require new elections, plaintiff would have the right to continue in the U.S. Supreme Court his efforts in behalf of his proposed injunctions.

Even should plaintiff elect not to appeal any judgment refusing new elections, a live issue would still remain in the potential use of replacement districts for any special elections that may be required in 1983 or 1984."

527.32 The Senate argued on February 5, 1983 at 7 Record 390:

"This Court should dismiss this action with prejudice, as it is moot. This Court should no longer permit such abuse and misuse of the judicial branch."

527.41 Plaintiff contends at 13 Record 220-224:

"The Senate has been resolute in its efforts to avoid coming to grips with the misnumbering issue. The Senate's first line of defense has been an

attempt to have the case declared moot. The following exchange [at the February 16, 1983 hearing] between the court and counsel for the Senate illustrates the Senate's position on mootness:

> 'JUDGE KARLTON: . . . Are you telling me that by virtue of the Legislature's adoption of a new reapportionment plan, which will guide the '84 election --
>
> 'MS. FERGUSON [Senate Counsel]: Yes.
>
> 'JUDGE KARLTON: -- this case is rendered moot; is that what you are trying to say?
>
> 'MS. FERGUSON: [Yes.] The basis of it being rendered moot is the election is basis of the -- after California --
>
> 'JUDGE KARLTON: Wait. Are there people presently serving

in the State Senate who were elected pursuant to the Supreme Court's plan?

'MS. FERGUSON: Yes, Your Honor.

'JUDGE KARLTON: That's moot? Are there people who meet Mr. Halliwell's assertion that they were deprived of an opportunity to vote in the present structure of the Senate by virtue of the re-numbering?

'MS. FERGUSON: The election rendered it moot, Your Honor.

'JUDGE KARLTON: Ma'am, answer my question. Mr. Halliwell says that by virtue of the plan adopted by the Senate, certain persons were, in effect, disenfranchised; is that true?

'MS. FERGUSON: For the '82 elections?

'JUDGE KARLTON: Yes.

'. . . . .

'JUDGE KARLTON: What's moot?

'MS. FERGUSON: Okay. The statute was never in effect. The '82 statutes were never in effect. Legislative statutes were never in effect.

'JUDGE KARLTON: I understand. [But he's] challenging the plan adopted by the Supreme Court, and the people elected under it are serving right now. What is moot? Mr. Halliwell says there are people who have been unconstitutionally deprived right now. Tell me how could that be moot?

'MS. FERGUSON: Well, Your Honor, is not the test on

mootness following election capable of repetition [but evading] review?

'. . . . .

'JUDGE KENNEDY: Supposing these were six-year terms? I mean just to test your theory. I suppose it is not beyond the power of this Court to order immediate elections in the districts that are improperly constituted. Now you might say that's an abuse of discretion or inequitable remedy, that 1984 is going to cure everything.

'You are saying now, there is nothing before the Court.

'MS. FERGUSON: Well, okay. The Supreme Court essentially ordered the Legislature to pass a redistrict plan for 1984.

'JUDGE KENNEDY: Mr. Halliwell is not, I'm sure, concerned ultimately with how the State injury arose, whether it was a redistricting plan foisted upon him by the Supreme Court of the State of California or the Senate and the Assembly acting together. He is arguing about representation so federal constitutional claims generally cannot be avoided simply by saying that a decision has been reached or a statute has been enacted or there is some new statute. As far as he's concerned, it's an ongoing injury that's properly alleged in the complaint, I should think.

'MS. FERGUSON: Well, my understanding of what I have

read, and you spoke of relief, say in terms of six years, I see remedial relief following election that simply dealt with procedural irregularities, like ballots, improper ballots.

'JUDGE KARLTON: That has to do with what is the appropriate remedy. The question is, when you talk about mootness, you are talking about whether there is a live controversy before the Court. There are folks sitting there, Mr. Halliwell claims, sitting there pursuant to an unconstitutional process.

'Now, is that claim moot, and if so, why?

'MS. FERGUSON: Your Honor, I can only repeat what I have said.' Id. at 31-34.

"The other counsel for the Senate tried to argue that if the case were not moot it would be inequitable to grant any relief:

'MR. SCHEIBE: Thank you. I think I should turn now to look at the balancing hardship. Not only the Plaintiff must show a probability of the success on the merits which he utterly failed to [do], but he must also show that a balance of hardship weighs heavily in his favor. This he cannot do.

'First of all, if this Court grants the order requested by Mr. Halliwell, we will basically be telling three Senators who spent a year of their life, much money, and a lot of effort in securing that nomination and election --

'JUDGE KARLTON: You know, counsel, I'm a little troubled by that argument. That's impressive the first time you hear it. And then the second time you say to yourself, so what we are going to do is disenfranchise a whole bunch of folks because these Senators spent money.

'Doesn't that strike you as a really strange way of weighing the equities in this case?

'MR. SCHIEBE: Not at this point in time when Mr. Halliwell had the opportunity to bring the plan early in February when he filed this action in a proper claim before they had spent their million dollars, before they altered their plans

and given up jobs and other positions.

'I think it would be totally unconscionable to allow Mr. Halliwell to wait for however long since February of last year and then come back and say now we are going to throw you out of office.

'JUDGE KARLTON: We do have that problem. We have the problem Mr. Halliwell is pursuing a fruitless appeal and that sort.' Id. at 80-81."

527.51 Plaintiff argued on August 3, 1984 at 13 Record 475-476: "Moreover, even if the 1984 districts were free of the constitutional defects in their predecessors the advantage of incumbency gained from the 1982 elections precludes any finding of mootness

regarding plaintiff's challenge to the constitutionality of the 1982 districts. In Firefighters Local Union No. 1784 v. Stotts (1984) 104 S.Ct. 2576, 2584 the U.S. Supreme Court affirms:

> 'As long as the parties have a concrete interest in the outcome of the litigation, the case is not moot notwithstanding the size of the dispute. Powell v. McCormack, 395 U.S. 486, 496-498 (1969).'

In Stotts Justice O'Connor notes in her concurring opinion:

> 'When collateral effects of a dispute remain and continue to affect the relationship of litigants, the case is not moot.' Id. at 2591."

527.61 Plaintiff argues on May 26, 1984 at 13 Record 120-122: "Even if all of plaintiff's proposals for post-election relief from the unconstitutionality of the 1982 congressional districts are determined to be unduly disruptive the constitutionality of these districts will not be moot. For if the 1982 districts were constitutional, 'preserving the cores of prior districts and avoiding contests between incumbent Representatives' Karcher v. Daggett (1983) 103 S.Ct. 2653, 2663 would be a valid justification for population disparities in the 1984 districts; but this would not be so if the 1982 districts were unconstitutional. This same question of constitutionality of prior districts was a crucial factor in evaluating successor districts to those invalidated in Karcher v. Daggett. On remand, the

District Court ruled in Daggett v. Kimmelman II (February 17, 1984) 580 F.Supp. 1259:

> 'The Democratic congressmen, intervenors, urge that the court adopt as a remedy the plan embodied in Senate Bill 3564 which passed the New Jersey Legislature, but was vetoed by Governor Kean. That plan, Exhibit IF-2(c), is reflected in the map, Exhibit D-6. A comparison of Exhibit D-6 with the map of the New Jersey congressional districts resulting from the Feldman Plan reveals that the districts are virtually identical. Some slight changes have been made, by moving municipalities among districts, so as to achieve a low district population of

526,020 and a high of 526,087, or a maximum variation of 67 persons and an absolute mean deviation of 11.50 persons. This plan produces a relative overall range of .01273%, and a relative mean deviation of .00218%.

'We need not consider how Exhibit IF-2(c) would have fared had it been validly enacted by the State of New Jersey. Compare Karcher v. Daggett 103 S.Ct. at 2667-78 (Stevens, J. concurring) with id 103 S.Ct. at 2687-90 (Powell, J. dissenting). Senate Bill 3564 is proposed to us as a remedy. As such it does not meet the criteria which we consider relevant to the exercise of our discretion in devising a

remedy. First, it does not achieve as small an overall or mean deviation as other plans which are in evidence. While it does succeed in preserving municipal boundaries, the population variances it would maintain are not maintained for that purpose, but rather for the purpose of preserving, as nearly as possible, the districts erected in the Feldman Plan. While Exhibit IF-2(c) preserves the cores of the districts established in the Feldman Plan, those districts are unconstitutional.' Id. at 1262.

'The most glaring defects in the Feldman Plan, however, are carried forward in Exhibit IF-2(c). These are an obvious absence of compactness, and an intentional

gerrymander in favor of certain Democratic representatives.' Id. 'Moreover, White v. Weiser teaches that "the District Court should defer to state policy in fashioning relief only where that policy is consistent with constitutional norms and is not itself vulnerable to legal challenge." 412 U.S. at 797. The state policy embodied in the Feldman Plan was to deviate from the norm of population equality for the patently discernible purpose of partisan advantage. That policy was not merely vulnerable to legal challenge; the challenge succeeded. We owe no deference to an unconstitutional state statute.' Id. at 1263."

527.73 Judges Kennedy, Karlton and Ramirez rule in the Order of July 9, 1985 at 15 Record 199-200:

"The plaintiff suggests that the court could invalidate the 1982 election, and shorten the terms of Members of the United States House of Representatives who were elected under the challenged plan. This remedy is not available. Terms of Members of the House are two years in duration, and therefore have already expired; there is nothing left to 'shorten.'"

527.75 Judges Kennedy, Karlton and Ramirez rule in the Order of July 9, 1985 at 15 Record 200:

"According to the plaintiff, incumbents running in subsequent elections are designated as such on the ballot. Plaintiff seeks to remove this

designation from Members elected in the challenged election, seeking reelection. This remedy is also not available, since the 1984 elections have already been held."

527.77 Plaintiff contends at 15 Record 241-243:

"MEASURES PROPOSED BY PLAINTIFF TO REDRESS THE CONTINUING EFFECTS OF UNCONSTITUTIONALLY CONDUCTED 1982 CONGRESSIONAL ELECTIONS ARE STILL VIABLE.

"The Order of July 9, 1985 states at [15 Record 200]:6-10:

> 'According to the Plaintiff, incumbents running in subsequent elections are designated as such on the ballot. Plaintiff seeks to remove this designation from members elected in the challenged election, seeking reelection.

> This remedy is also not available since the 1984 elections have already been held.'

While some incumbents list themselves as 'Congressmen,' 'Member of Congress,' 'United States Representative,' or some other occupational title which means the same thing as incumbent, the political advantage is the same. Plaintiff sought to deprive incumbents of the six flagrantly unconstitutional, specially tailored congressional districts (see 13 Record 15-16) of their incumbent's ballot designation at the next election, which was the 1984 election at the time the proposal was briefed. As Plaintiff documents at 8 Record 514-522, all six of these incumbents retain safe seats in the new plan, and they indisputably retain the same status of incumbents which they won in 1982. The advantage of being listed as such on the 1984

ballot helped to preserve the designation and will do so again in the 1986 election, so the effects of the unconstitutional elections continue.

"In Firefighters Local Union No. 1784 v. Stotts (1984) 104 S.Ct. 2576, (a case cited by Plaintiff at 13 Record 475-476 in support of his August 3, 1984 rebuttal in behalf of his motion to reconsider the Order of March 27, 1984,) Justice O'Connor notes: 'When collateral effects of a dispute remain and continue to affect the relationship of litigants, the case is not moot.' Id. at 2591. Moreover, the residual effect in Stotts, a few months' advantage in seniority gained before the laid-off white firemen were rehired, is similar in its continuing impact to the advantage of incumbency in politics.

"Plaintiff happens to be

represented by Congressman Mel Levine, one of the six new Democratic Representatives elected from specially tailored malapportioned districts in 1982, so the following ruling of the Stotts court is also appropos: 'As long as the parties have a concrete interest in the outcome of the litigation, the case is not moot notwithstanding the size of the dispute. Powell v. McCormack, 395 U.S. 486, 496-498 (1969).'

"Regardless of the fate of Plaintiff's proposal to strip certain congressional incumbents of this ballot designation, there remains the matter of declaratory relief. The order of March 27, 1984 states at 21:23-22:3:

> 'On December 6, 1983, the Plaintiff filed a motion for declaratory judgment (by which the Court understands the Plaintiff to mean summary judgment)

on the constitutionality of the districts used in California's 1982 congressional and state legislative elections. . . .'

Even though Defendant's refusal to respond to this motion has greatly delayed its adjudication it is not moot even at this late date because a decision on it will have tangible impact on the congressional situation as it exists today.

"This is so because a declaratory judgment that the 1982 districts were unconstitutional will affect any ruling on the constitutionality of the successor districts. The U.S. Supreme Court ruled in Karcher v. Daggett infra that modest population disparities may be justified in order to 'preserve the cores of prior districts'; but this is so only if the prior districts were constitutional.

"Plaintiff has called this continuing effect of the 1982 districts to the attention of the Court, but the Court has simply ignored it in the Order of July 9."

527.79 Plaintiff contends at 15 Record 268:

"At 13 Record 120 Plaintiff notes: 'Even if all of Plaintiff's proposals for post-election relief from the unconstitutionality of the 1982 congressional districts are determined to be unduly disruptive the constitutionality of these districts will not be moot. For if the 1982 districts were constitutional, "preserving the cores of prior districts and avoiding contests between incumbent Representatives" Karcher v. Daggett (1983) 103 S.Ct. 2653, 2663 would be a valid justification for population disparities in the

1984 districts; but this would not be so if the 1982 districts were unconstitutional. This same question of constitutionality of prior districts was a crucial factor in evaluating successor districts to those invalidated in Karcher v. Daggett [supporting quotation from Daggett v. Kimmelman II (1984) 580 F.Supp. 1259, 1262-1263 at 13 Record 120-122].'"

#529 AN ISSUE CAPABLE OF REPETITION YET EVADING REVIEW

529.11 Plaintiff contends at 7 Record 337-338:

"Should all issues be resolved except for possible declaratory judgments of unconstitutionality mootness still would not be applicable, as this case evaded review prior to the election and similar legislative gerrymanders may well occur in the future. Plaintiff has already analyzed nonmootness based on the doctrine of 'capable of repetition but evading review' (3 Record 345-347). This analysis makes clear that potential repetitions need only involve similar rather than identical issues. Moreover, it has also been demonstrated that cases involving elections are quite likely to be classified as 'capable of repetition but evading review.'"

529.22 The Senate argued on February 5, 1983 at 7 Record 387-388: "This action is moot. As the Senate has previously indicated, this action is a challenge to the action and order of the California Supreme Court in Assembly v. Deukmejian (1982) 30 Cal. 3d 638 in that Court's adoption of temporary court-ordered reapportionment plans for the 1982 elections only. Further, the 1982 California primary and general elections have been held. Chapter 8 of California Statutes of 1983, First Extraordinary Session, reapportioning the boundary lines for Senatorial and Assembly Districts is in effect. The Senate requests that this Court take judicial notice of Chapter 8 of the Statutes of 1983 First Extraordinary Session, attached hereto [see 6 Record 278-412]. F.R.Evid.Rule 201.

"A challenge to the California Supreme Court's order and decision in Assembly v. Deukmejian, supra, and any question as to whether that Court acted with purposeful discrimination, arbitrarily and capriciously, or in bad faith is simply moot. The actions of the Court in Assembly is not capable of repetition yet evading review nor does it control future elections. The order and actions of the California Supreme Court concerns and is explicitly limited to the 1982 elections only."

529.31 Plaintiff contends at 10 Record 70-72:

"The Assembly alleges (at 3 Record 247) that the use of the Legislature's redistricting plans for the 1982 elections is now moot since 'This is not, of course, a case "capable of repetition yet evading review." Dunn v. Blumstein

405 U.S. 330, 333 (1972).' In fact the abuse of equitable discretion by the California Supreme Court in Assembly v. Deukmejian and the 'run-out-the-clock' strategy which successfully prevented pre-election adjudication of the constitutionality of the districts used for the 1982 congressional, state legislative and Board of Equalization elections is precisely the sort of constitutional violation that becomes a fait accompli before it can be adjudicated. In Roe v. Wade (1973) 410 U.S. 113, 125 the U.S. Supreme Court ruled [that issues, which by their nature must be resolved before the process of adjudication runs its course, do not become moot if capable of repetition]. Moreover, while 28 U.S.C. 2284(b)(2) requires prompt adjudication of state redistricting cases, the 1982 elections have come and gone without any ruling

by this court on the constitutionality of the districts used to conduct them. Since the court has consumed more time in this process of adjudication than the time taken by the elections process itself, Wade v. Roe is clearly applicable. Indeed, Wright and Miller note that the 'capable of repetition yet evading review' is especially appropriate in elections cases. [Quotations from Federal Practice and Procedures § 3533 at 266-267, 278-279, 288 and 288-289]."

529.42 The Senate argued on November 30, 1982 at 6 Record 33:

"The Senate of the State of California contends that plaintiff's action is moot by virtue of the November 2, 1982 general election as there will be new Legislative and Congressional Districts for the 1984 elections and this action is not 'capable of repetition yet evading review'."

529.52 The Senate contends at 7 Record 20:

"An action is not moot where the act which causes an alleged constitutional violation remains and controls future elections and the question raised is capable of repetition, yet evading review. See, Moore v. Ogilvie (1969) 394 U.S. 814, 816, Rosario v. Rockefeller (1973) 410 U.S. 752, 756, n. 5.

"This action is moot as the California Supreme Court ordered the redistricting plans for the 1982 elections only and for no others. The California Supreme Court order does not remain and control future elections and the question as to the actions of the California Supreme Court in adopting the plans is not capable of repetition, yet evading review as the adoption of the plans in Assembly v. Deukmejian, supra, is for the 1982 elections only."

529.61 Plaintiff contends at 13 Record 23-25:

"In Rosario v. Rockefeller (1973) 410 U.S. 752, 756 n. 5 the opinion notes, 'Although the June Primary election has been completed and the petitioners will be eligible to vote in the next scheduled New York Primary, this case is not moot, since the question the petitioners raise is "'capable of repetition, yet evading review.'"'

"In Democratic Party of the United States v. Wisconsin (1981) 450 U.S. 107, 115 n. 13 the opinion notes:

> 'This case is not moot. The Wisconsin Supreme Court's order is not explicitly limited to the 1980 Convention. The effect of the order "remains and controls future elections." Moore v. Ogilvie, 394 U.S. 814. In any event, even if the order were

clearly limited to the 1980 election year, the controversy would be properly before us as one "capable of repetition, yet evading review." Rosario v. Rockefeller, 410 U.S. 752, 756 n. 5; Dunn v. Blumstein, 405 U.S. 330, 333 n. 2.' Emphasis added.

"An additional aspect of the 1982 congressional elections capable of repetition relates to the authority of the California Supreme Court to adopt a congressional redistricting plan on its own authority without even considering compliance with the strict population equality mandated for congressional districts by Article I § 2 of the Federal Constitution. The time has come to adjudicate the question posed by Judge Karlton at the October 27, 1982 hearing:

'Counsel, are you asking us

> to believe that the California Supreme Court adopted a plan which was challenged as unconstitutional without considering whether it comported with federal constitutional standards? If that is your argument, would any court then defer to that court?' 11 Record 214.

"The defendants have never contested plaintiff's allegation that the population disparities in the Burton Plan cannot pass muster under Article I § 2 of the U.S. Constitution. The major focus of controversy has been the application of Reynolds v. Sims (1964) 377 U.S. 533, 585 allowing the use of invalid apportionment plans 'under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress [and] equitable considera-

tions might justify a court in withholding the granting of immediately effective relief . . . .' (Emphasis added.) The application of the Reynolds standard governing a court's equitable discretion in apportionment cases clearly fits within the 'capable of repetition yet evading review' doctrine since the challenged election may have taken place before adjudication of the challenge is completed. In Storer v. Brown (1974) 415 U.S. 724, 737, n. 8 the opinion notes, 'The "capable of repetition, yet evading review" doctrine, in the context of elections cases, is appropriate when there are "as applied" challenges as well as in the more typical case involving only facial attacks.' Storer also notes, '[Adjudication] will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be

adjudicated before an election is held.'"

529.71 Plaintiff contends on August 18, 1984 at 13 Record 566: "The Secretary of State argues [at 13 Record 545] that since the 1982 elections have been conducted the role of the California Supreme Court in selecting the districts used to conduct these elections no longer raises 'any live question of law or fact.' However, the adoption of an interim redistricting plan for an election that is close at hand is precisely the sort of state action the constitutionality of which would in most instances be difficult to adjudicate before the election is conducted. Thus it is an issue which is clearly 'capable of repetition yet evading review.' See Roe v. Wade (1973) 410 U.S. 113; United States v. W.T. Grant Co. (1953) 345 U.S. 629."

529.74 Judges Kennedy, Karlton and Ramirez rule in the Order of July 9, 1985 at 15 Record 200: "Certain controversies are of such short duration, that strict application of the mootness doctrine would prevent them ever from being brought to court for resolution, notwithstanding the injuries they cause. See, e.g., Roe v. Wade, 410 U.S. 113, 125 (1973) (controversies involving pregnancy). Such controversies are capable of repetition, yet they evade judicial review by virtue of their short duration. See Storer v. Brown, 415 U.S. 724, 737 n.8 (1974) (quoting Rosario v. Rockefeller, 410 U.S. 752, 756 n.5 (1973)); NAACP, 743 F.2d at 1353 (quoting Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 546 (1976)). Controversies involving elections are often within this category. See, e.g., Anderson v. Celebrezze, 460 U.S. 780, 784 n.3

(1983)."

529.75 Plaintiff contends at 15 Record 247-251:

"The Order of July 9, 1985 states at [15 Record 200]:15-21:

> 'Certain controversies are of such short duration, that the strict application of the mootness doctrine would prevent them ever from being brought to court for resolution, nothwithstanding the injuries they cause. See e.g. Roe v. Wade, 410 U.S. 113, 125 (1973) (controversies involving pregnancy). Such controversies are capable of repetition, yet they evade judicial review by virtue of their short duration.'

"The cited portion of Roe v. Wade provides:

'But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be "capable of repetition, yet evading review." Southern

Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911). See Moore v. Ogilvie, 394 U.S. 814, 816 (1969); Carroll v. Princess Anne, 393 U.S. 175, 178-179 (1968); United States v. W.T. Grant Co., 345 U.S. 629, 632-633 (1953).

'We, therefore, agree with the District Court that Jane Roe had standing to undertake this litigation, that she presented a justiciable controversy, and that the termination of her 1970 pregnancy has not rendered her case moot.' 113 U.S. at 125.

Clearly Halliwell v. Eu meets the requirements of 'capable of repeition, yet evading review' to an even greater degree than Roe v. Wade, as the California Supreme Court's interim redistricting plan has 'come to term' before

the District Court phase of litigation is complete, much less the 'usual appellate process.'

"The Order of July 9, 1985 notes [at 15 Record 200] that controversies involving elections are often within the category of 'capable of repetition, yet evading review' and cites Rosario v. Rockefeller, 410 U.S. 752, 756 n. 5 (1973) and Anderson v. Celebrezze, 460 U.S. 780, 784 n. 3 (1983) as examples.

"The cited portion of Rosario v. Rockefeller notes:

> 'Although the June primary election has been completed and the petitioners will be eligible to vote in the next scheduled New York primary, this case is not moot, since the question the petitioners raise is "'capable of repetition, yet evading re-

> view.'" Dunn v. Blumstein, 405 U.S. 330, 333 n. 2 (1972); Moore v. Ogilvie, 394 U.S. 814, 816 (1969); Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911).'

This case clearly effectuates the principle that the rights involved in election cases are so fundamental that petitioners may challenge a possible repetition as to others even if they themselves 'will be eligible to vote in the next scheduled New York primary.' Another of this Court's references, NAACP supra, exemplifies the same waiver of 'the prudential rule that a litigant has standing to vindicate only his own constitutional rights' because 'The concern that constitutional adjudication be avoided whenever possible is simply outweighed by the risk to society of losing the speech of those

deterred from engaging in protected expression. Munson, 104 S.Ct. at 2847.' 743 F.2d at 1352.

"The portion of Anderson v. Celebrezze notes:

> 'The Secretary of State promptly appealed and unsuccessfully requested expedited review in both the Court of Appeals and this Court, but apparently did not seek to stay the District Court's order. [Footnote: After the Court of Appeals denied a motion for expedited appeal, respondent filed a petition for a writ of certiorari before judgment in this Court, together with a motion to expedite consideration of the petition. The motion and the petition were both denied before

the election in November 1980. 448 U.S. 914 and 918 (1980). Even though the 1980 election is over, the case is not moot. See Storer v. Brown, 415 U.S. 724, 737, n. 8 (1974).] The election was held while the appeal was pending. In Ohio Anderson received 254,472 votes, or 5.9 percent of the votes case; nationally, he received 5,720,060 votes or approximately 6.6 percent of the total.'

Here again the plaintiff (John Anderson) has no stake in the outcome of the litigation but 'the case is not moot.'

"This Court has not cited any elections case declared moot for lack of a continuing injury which can 'be redressed by a favorable judicial decision,' and Plaintiff believes

that no such case has occurred since Dunn v. Blumstein (1972) 405 U.S. 330 established the current application of 'capable of repetition, yet evading review' to political rights. Warth v. Seldin (1975) 422 U.S. 490, 499-500 does note that in ordinary circumstances respect for the properly limited role of courts in a democratic society supports prudential limitations on adjudication, and these prudential limitations do require that a plaintiff have a distinct personalized interest to defend so that courts avoid abstract decisions other governmental institutions are more able to make. However, these prudential limitations do not apply where political rights are involved.

> 'We do not believe that prudential notions of self-restraint in the area of standing are prop-

erly invoked in cases involving the dilution of an individual's fundamental voting rights: when a complaint alleges injury from a clogged democratic process, it would be anomalous to require the plaintiff to seek relief from political institutions.' O'Hair v. White, 675 F.2d 680, 689 (5th Cir. en banc 1982)."

529.77 Plaintiff contends at 15 Record 244-247:

"PLAINTIFF'S CHALLENGE TO THE 1982 DISTRICTS IS 'CAPABLE OF REPETITION YET EVADING REVIEW.'

"The Order of July 9, 1984 [at 15 Record 200] cites N.A.A.C.P. Western Region v. City of Richmond (1984) 743 F.2d 1346, 1353 as setting forth the elements of the 'capable of repetition,

yet evading review doctrine.' NAACP notes:

> 'The Supreme Court has stated, however, that a case is not moot if the underlying dispute between the parties is "capable of repetition, yet evading review." Nebraska Press Assn. v. Stuart, 427 U.S. 539, 546, 96 S.Ct. 2791, 2797, 49 L. Ed.2d 683 (1976), quoting Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911). Two elements are necessary for a dispute to satisfy this standard: (1) the duration of the challenged action or injury must be too short to be fully litigated; and (2) there must be a reasonable likelihood that the same party will be sub-

ject to the action again. See Weinstein v. Bradford, 423 U.S. 147, 149, 96 S.Ct. 347, 348, 46 L.Ed.2d 350 (1975); Planned Parenthood v. Arizona, 718 F.2d 938, 949 (9th Cir. 1983).' Id. 'A case does not become moot even if a defendant voluntarily discontinues the allegedly illegal activity. See Iron Arrow Honor Society v. Heckler, ___ U.S.___, 104 S.Ct. 373, 375, 78 L.Ed.2d 58 (1983). Otherwise, the defendant would be free to "return to his old ways" once the danger of a lawsuit has passed. Id., quoting United States v. W.T. Grant Co., 345 U.S. 629, 632, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953). To establish mootness, therefore, the defendant must carry the

> "heavy burden" of demonstrating that "there is no reasonable likelihood that the wrong will be repeated." Id. Richmond has made no such showing here.' Id., n. 6.

"Clearly Plaintiff's challenge to the interim redistricting plans adopted in Assembly v. Deukmejian (1982) 30 Cal.3d 638 meets both of the criteria listed above. (1) There were 277 days between the adoption of the contested districts on January 28, 1982 and the November 1, 1982 General Election, and 271 of these days had passed before the three-judge tribunal (required by 28 U.S.C. § 2284 for the adjudication of constitutional challenges to statewide redistricting plans) held its first hearing. (2) Every voter in the state is subject to a redistricting plan such as Plaintiff challenges, and this will

always be the case since the 'ripple effect' of changing any district boundary inevitably links the interests of residents of all districts. See Swann v. Adams (1967) 385 U.S. 440, 443.

"NAACP supra relies upon Nebraska Press Ass'n v. Stuart (1976) 427 U.S. 539, which states:

> 'The order at issue in this case expired by its own terms when the jury was impaneled on January 7, 1976. There were no restraints on publication once the jury was selected, and there are now no restrictions on what may be spoken or written about the Simants case. Intervenor Simants argues that for this reason the case is moot.
>
> 'Our jurisdiction under Art. III, § 2, of the Constitution extends only to actual cases and

controversies. Indianapolis School Comm'rs v. Jacobs, 420 U.S. 128 (1975); Sosna v. Iowa, 419 U.S. 393, 397-403 (1975). The Court has recognized, however, that jurisdiction is not necessarily defeated simply because the order attacked has expired, if the underlying dispute between the parties is one "capable of repetition, yet evading review." Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911).

'The controversy between the parties to this case is "capable of repetition" in two senses. First, if Simants' conviction is reversed by the Nebraska Supreme Court and a new trial ordered, the District Court may enter another re-

strictive order to prevent a resurgence of prejudicial publicity before Simants' retrial. Second, the State of Nebraska is a party to this case; the Nebraska Supreme Court's decision authorizes state prosecutors to seek restrictive orders in appropriate cases. The dispute between the State and the petitioners who cover events throughout the State is thus "capable of repetition." Yet, if we decline to address the issues in this case on grounds of mootness, the dispute will evade review, or at least considered plenary review in this Court, since these orders are by nature short-lived. See, e.g., Weinstein v. Bradford, 423 U.S. 147 (1975);

> Sosna v. Iowa, supra; Roe v. Wade, 410 U.S. 113, 125 (1973); Moore v. Ogilvie, 394 U.S. 814, 816 (1969); Carroll v. Princess Anne, 393 U.S. 175, 178-179 (1968). We therefore conclud that this case is not moot, and proceed to the merits.' Id. at 546-547.

The possibility of repetition in Stuart supra on account of a reversal of Simants' conviction and a new trial closely resembles the situation in Halliwell v. Eu, as the current congressional districts are the subject of ongoing litigation see Badham v. United States District Court for the Northern District of California (1983) 721 F.2d 1170, and they could well be replaced by a court-ordered plan if found to be unconstitutional."

#584 COMITY WITH STATE JUDICIAL PROCEEDINGS

584.14 The Assembly contends at 3 Record 243-246:

"Comity requires that this court defer to the California Supreme Court. The Supreme Court of the United States has long recognized the importance of comity in dealing with matters of state reapportionment. [See] Scott v. Germano, 381 U.S. 407 (1965) . . . . In short, even if this Court technically has jurisdiction to hear some of plaintiff's claims, it should stay its hand."

584.17 Plaintiff contends at 11 Record 469-470:

"[Aggrieved parties] have tried and failed to have the constitutionality of the contested districts adjudicated by California courts. Comity therefore provides no reason for further delay

in deciding the constitutionality of these districts.

"In Steffel v. Thompson (1974) 415 U.S. 452, 461-462 the U.S. Supreme Court observes:

> '[I]n Samuels v. Mackell, the Court stated: "We, of course, express no views on the propriety of declaratory relief when no state proceeding is pending at the time the federal suit is begun." 401 U.S. at 73-74 [citations].
>
> 'These reservations anticipated the Court's recognition that the relevant principles of equity, comity, and federalism "have little force in the absence of a pending state proceeding." Lake Carriers' Assn. v. MacMullan, 406 U.S. 498, 509 (1972).'"

584.18 Assembly Counsel argued at the June 11, 1982 hearing at 11 Record 37:

"As to . . . the question of comity, we would argue that it is not [applicable]. We would agree with the court that we are not talking about a situation where this court should stay its hand to allow the California Supreme Court to do what it needs to do. This is clearly done."

584.32 Defendant contends at 12 Record 462:

"Where, as here, the state courts adopt an emergency resolution [of a reapportionment dispute] that has enjoyed wide support in the federal courts, including the United States Supreme Court, basic considerations of federalism and comity require that the federal courts accord proper respect to the decisions of state courts. In the circumstances presented

by plaintiff Halliwell's complaint and the decision of the California Supreme Court in Assembly v. Deukmejian, it is clear the applicable principles of law and equity require that the complaint must be dismissed."

584.52 Judge Karlton rules at 4 Record 53-54:

"Little need be said regarding the defendants' contention that 'as a matter of comity, abstention, equity and federalism, this court should refuse to review plaintiff's complaint.' As the Supreme Court has commented about the leading abstention doctrine, 'this principle does not, of course, involve the abdication of federal jurisdiction but only the postponement of its exercise.' Harrison v. NAACP, 360 U.S. 167, 177 (1959). In the case at bar, there are no pending or anticipated state pro-

ceedings that will dispose of the matters in issue, save and except the November election which may render those issues moot. Quite simply, there is no proper basis for abstention in this case. As for comity and federalism, those doctrines neither require nor permit this court to reject out of hand a constitutional challenge to reapportionment plans devised by a state, whether those plans were adopted by the state legislature or by a final decision of the state's highest judicial body. Lastly, notions of equity may indeed be dispositive in this case. See Reynolds v. Sims, 377 U.S. 533, 585 (1964). Such equitable considerations, however, will be entertained if and when the court considers what remedies, if any, may be afforded to the plaintiff. These considerations do not bear on the question of whether the plaintiff has

properly invoked the jurisdiction of this court, or whether he has stated a claim upon which relief can be granted."

#585 DISTRICT-COURT REVIEW OF STATE-COURT-MANDATED REDISTRICTING PLANS

585.14 The Senate contends at 3 Record 21:

"It is the equitable and judicial action of the California Supreme Court which plaintiff seeks this court to enjoin and naught else. This United States District Court should not be used as a forum to appeal decisions of the California Supreme Court, nor should decisions of the California Supreme Court be collaterally attacked here."

585.15 Plaintiff contends at 9 Record 6-7:

"And when the Missouri Supreme Court refused to implement the strict population equality requirements for congressional districts mandated by Wesberry v. Sanders supra a federal district court recognized that 'A citizen's

right to vote free of arbitrary impairment by state action,' Baker v. Carr supra, included protection against arbitrary action by a state supreme court. In Preisler v. Secretary of State of Missouri I (1965) 238 F.Supp. 187 the opinion notes that

> 'defendants cite Preisler v. Hearnes, 362 S.W.2d 552, a decision of the Supreme Court of Missouri, en banc, where the Congressional Apportionment of Missouri here questioned was ruled constitutional and sustained as being "as nearly equal in population as may be," as mandated by Article III, Section 45, of the Missouri Constitution, V.A.M.S.; the Fourteenth Amendment to the United States Constitution; Article I, Section 2, of the Missouri Constitution;

and Title 2, Section 2a(c), United States Code.

'Certiorari was not sought from the decision of the Supreme Court of Missouri in Preisler v. Hearnes, supra. Thus, this Three-Judge United States District Court is placed in the judicially-unenviable role of reviewing a decision of the highest court of the State of Missouri, without previous review thereof by the Supreme Court of the United States. . . . Wesberry v. Sanders, supra, teaches that apportionment is void when it appears from the scheme thereof there has been inadequate consideration to equality in population as between districts in the same State.' Id. at 189-190.

Emphasis added.

'In light of Wesberry v. Sanders, supra, it appears that a variance in population difference of 100,000 persons between congressional districts having less than 500,000 is presumptive malapportionment.' Id. at 190."

585.18 Defendant contends at 3 Record 222:

"The substance of what plaintiff is seeking is for this court to review the decision of the California Supreme Court in its order for temporary reapportionment plans for the 1982 primary and general election. Defendant asserts that this United States District Court should not be used as a forum to appeal decisions of the California Supreme Court. On the bases of comity and abstention, this Court should restrain

itself from this proceeding."

585.31 Plaintiff contends at 10 Record 103:

"In an Illinois case where a legislative redistricting plan was being challenged in both state and federal courts the U. S. Supreme Court ruled that the state supreme court was best situated to apply both state and federal law to the controversy and therefore should be allowed to adjudicate its suit first. But the U.S. Supreme Court also ruled that the federal district court could determine the validity of any redistricting plan adopted by Illinois state agencies, including its supreme court, and if no valid plan had been adopted by a reasonable deadline set by the district court the federal court could adopt its own reapportionment plan. [See quotation from Scott v. Germano (1965) 381 U.S.

407, 409 at 10 Record 103-104]."

585.41 Plaintiff contends at 11 Record 93-97:

"[Judge Karlton ruled in his order of July 1, 1982]:

> 'The plaintiff has offered no reason why this court should treat the California Supreme Court as if it were an inferior federal court rather than treating it as what it is: a branch of state government coequal to and, for these purposes, possessed of the same authority as the state legislature. Cf. Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980); Garner v. Louisiana, 368 U.S. 157 (1961); Winters v. New York, 333 U.S. 507 (1948).]' (4 Record 61) . . . .

"While the U.S. Supreme Court has specifically encouraged state courts to assume responsibility for redistricting when a state's political branches of government fail to properly discharge this responsibility, Maryland Committee v. Tawes (1964) 377 U.S. 656, and federal courts have been advised to give state courts an adequate opportunity to adopt redistricting plans before doing so themselves, Scott v. Germano (1965) 381 U.S. 407, the U.S. Supreme Court has also charged federal district courts with the responsibility of determining the validity of reapportionment plans adopted by 'appropriate agencies of the state . . . including its supreme court' and in the event no valid plan has been adopted the federal district court 'may enter such orders as it deems appropriate, including an order for a valid reapportionment plan.' Scott v. Germano at 409.

"While the principle of comity requires lower federal courts to move with great circumspection in challenging the actions of state supreme courts, and the U.S. Supreme Court has reserved to itself the responsibility of reviewing the actions of state supreme courts in the field of criminal justice, Darr v. Burford (1950) 339 U.S. 200, 217, lower federal courts have rejected redistricting plans approved by a state supreme court, Preisler v. Secretary of State of Missouri I (1965) 238 F.Supp. 187, 189-190 and even issued injunctions directly to a state supreme court in O'Connor v. Mowbray (1980) 504 F.Supp. 139, 143. The plain fact of the matter is that except as the Supreme Court mandates specific exceptions, Article VI § 2 places every agency of the federal government above the highest agencies of state government."

585.51 Plaintiff contends at 11 Record 425: "Although Judge Karlton ruled out enforcement of anti-gerrymandering standards for court-ordered plans since there is 'no reason why this court should treat the California Supreme Court as if it were an inferior federal court,' 4 Record 61, federal courts are indeed of superior status to state courts under the provisions of Article VI § 2 of the U.S. Constitution. In Upham v. White (1982) 639 S.W.2d 301, 301 the Texas Supreme Court affirms that 'The Supremacy Clause makes the order of [a three-judge United States District] court binding on state courts.' In O'Connor v. Mowbray (1980) 504 F.Supp. 139 a federal district court issued an injunction to a state supreme court to protect federal rights from infringement by the state court." [See supporting quotations from 504 Supp. at 141, 143 at 11 Record 425-427.]

#613 NEED FOR JOINDER OF CALIFORNIA SUPREME COURT

613.15 Plaintiff summarized the "NEED FOR JOINDER OF CALIFORNIA SUPREME COURT" on January 17, 1984 at 12 Record 4-6:

"While plaintiff's original joinder of the California Supreme Court was essentially a matter of fundamental fairness (since his case is based in part on allegations of bad faith by a majority of that Court) the Court's subsequent actions (clearly demonstrating that the Court is willing to engage in wholesale abrogation of the State Constitution) have made the Court an indispensable party to this action.

"This is all the more obvious when one applies the Assembly's arguments in favor of compulsory joinder of California's congressional delegation

to the California Supreme Court's relationship to this case. In the Assembly's justification for its joinder motion it is noted:

> 'Under Rule 19(a)(2), whether California's congressional representatives are needed for a just adjudication turns first on whether they have an interest relating to the subject of Mr. Halliwell's action.' (7 Record 6.)

While numerous actual and potential candidates in each district have an interest in district boundaries as well as incumbent congressmen, the interest of the California Supreme Court in the outcome of Halliwell v. Eu is unique; for a finding by this Court or by the U.S. Supreme Court that the Guaranty Clause has been violated by the California Supreme Court will severely damage

the professional reputations of the members of the California Court who supported the majority opinions being challenged in this action. No other individuals in California have so vital a stake in the outcome of this action. Participation by the California Court in these proceedings will assure 'that concrete adverseness which sharpens the presentation of issues upon which the [U.S. Supreme] Court so largely depends for illumination of different constitutional questions.' Baker v. Carr (1962) 369 U.S. 186, 204.

"The Assembly's justification for its joinder motion also identifies 'the other applicable requirement under Rule 19(a)(2) -- that the absence of members of Congress from this action, as a practical matter, impairs their ability to protect that interest --' (7 Record 6-7). This factor had little

force regarding congressional joinder, since the redistricting committees of the Legislature have better access than congressmen to all information relating to the contested districts and their drafting. However, access to information needed to defend the California Supreme Court's adoption of the Legislature's redistricting plans is a vital factor requiring the California Supreme Court's joinder in Halliwell v. Eu.

"In opposing the Assembly's motion for compulsory joinder of the members of California's congressional delegation plaintiff argued that 'The real issue is whether any of these affected parties is possessed of information that will aid the Court in properly deciding this case.' (7 Record 264.) The Chief Justice of the California Supreme Court has seen fit not

to even mention vital issues raised in Assembly v. Deukmejian such as senate district misnumbering, congressional district population disparities, and outrageous fragmentation of cities in the Assembly plan in the Court's opinion. In Legislature v. Deukmejian the unsigned majority opinion is even more disingenuous. Accordingly any attempted defense based on the bare text of the Court's opinions will be inadequate, and the Court itself must defend the reasoning by which it determined that practical necessity required the wholesale disregard of the California Constitution."

613.26 Defendant argued on August 13, 1984 at 13 Record 543-545:

"Plaintiff seeks to join as party defendant 'the California Supreme Court as represented by Chief Justice Bird.'

"Plaintiff's complaint with the Supreme Court grows out of the facts outlined in this court's Order issued July 1, 1982, [4 Record 40:6-43:24]. Briefly stated, the state Supreme Court issued an opinion ordering certain congressional and legislative district boundary lines into effect for the 1982 elections. Assembly vs. Deukmejian (1982) 30 Cal. 3d 638. Plaintiff filed an amicus curiae brief in the state case. He has disagreed bitterly with the court's decision ever since it was issued, on alleged procedural and substantive grounds, and even apparently considered the court to be a party to the instant action until this court properly instructed him otherwise. Order, March 27, 1984, [12 Record 252] n. 3.

"Abundant grounds exist for denying the motion to join the state court. This court has already rightly

pointed out that plaintiff cannot state a procedural due process cause of action against the court (Order, July 1, 1982, [4 Record 46] and cannot complain in federal court of the state court's interpretation of state law which formed a substantial part of the state court's opinion and forms a substantial part of plaintiff's current complaints. [4 Record 47.]

"Further, this court has narrowed and defined the issue in the present case to be limited to the allocation of population among the 1982 congressional districts under federal requirements. Order, March 27, 1984, [12 Record 251-252]. The state court plays no role in that issue, since the federal courts have authority to measure state reapportionment plans against federal standards whether the plans originate in the state legislature or

courts. Order, July 1, 1982, [4 Record 53].

"Finally, the motion to join should be denied since the claim against the state court amounts in substance to an attempt to re-litigate or appeal the state court's decision, when the state case has long since become final and non-appealable.

"For all of these reasons, it is not possible for plaintiff to assert 'any right to relief' against the Supreme Court or raise any live 'question of law or fact' against it within the meaning of Fed.R.Civ.P. 20(a) concerning permissive joinder of parties. The motion should be denied."

613.31 Plaintiff argued on August 18, 1984 at 13 Record 565-566: "The Secretary of State argues [at 13 Record 544] that the California Supreme Court should not be joined as a defendant because the California Court played no role relevant to population disparities among the contested districts. However, this court has explicitly noted the responsibility of the California Court in this area:

> 'The court first notes that the disparities alleged by the plaintiff in this plan do not approach the level of egregious malapportionment present in other plans condemned by the Supreme Court; indeed, if there is any point at which deviations are sufficiently de minimis as to preclude constitutional challenge (see, Swann v. Adams,

385 U.S. 440, 447 (1967), this plan may well be permissible on that ground. The court has taught, however, that in drawing congressional districts, a state must "make a good faith effort to achieve precise mathematical equality." Kirkpatrick v. Preisler 394 U.S. 526, 530-31 (1969); see also Daggett v. Kimmelman, 535 F.Supp. 978 (D.N.J.), probable jurisdiction noted, ___ U.S. ___, 102 S.Ct. 2955 (1982). The record before this court is not now sufficient for this court to make any intelligent determination as to whether that standard was met. In this regard, though, the court notes that the challenged plan was adopted for this election only

by the California Supreme Court, and that in doing so that court concluded that it was far and away the most satisfactory plan available in terms of compliance with the one person, one vote mandate. Assembly v. Deukmejian, 30 Cal.3d at 674. At least at this stage in the proceedings, we must give some deference to the findings of the California Supreme Court.' Order of November 1, 1982 at [5 Record 480-481]."

613.41 Plaintiff contends on August 18, 1984 at 13 Record 567-568:

"Counsel for the California Supreme Court also argues that the court should not be a party to these proceedings because

'Even if this Honorable Court could find some claim-stated

> by plaintiff in the instant case, plaintiff makes no showing why the present defendants cannot adequately defend against that claim. There is no reason to involve another court as a litigant.' [13 Record 550.]

But the circumstances in this case are far different than when a state court has ruled on the constitutionality of the action of some other agency of state government. The California Supreme Court is the logical defender of the districts which the court adopted as its own plan, especially since crucial aspects of the process by which the contested districts were selected are known only to the California Court. Thus plaintiff should be allowed to develop this aspect of his case by means of formal inquiries directed to the

Court.

"Moreover, the extraordinary evasiveness manifest by the Secretary of State, the Senate and the Assembly in response to plaintiff's inquiries propounded to them is analyzed in Appendix I [13 Record 573-598], and this analysis clearly demonstrates the need for plaintiff to secure information directly from the officials responsible for the adoption of the districts at issue in these proceedings."

613.54 The Assembly argued at 13 Record 490-491:

"The Assembly opposes plaintiff's motion to join the California Supreme Court as a defendant.

"Plaintiff's Motion is largely premised on a claim under the Guaranty Clause that has already been dismissed by this Court. Order, filed July 1,

1982, [4 Record 49:25-51:12]; Memorandum and Order Following Hearing, filed April 19, 1983, [8 Record 120:24-121:19]. Mr. Halliwell's contention that the Supreme Court's participation is necessary to assist the Secretary of State in defending the 1982 Congressional districts is similarly without merit. See Order, filed July 1, 1982, [4 Record 45:3-46]; Memorandum and Order Following Hearing filed April 19, 1983, [8 Record 125:19-22]. Plaintiff's unhappiness with the decisions of the California Supreme Court does not rise to the level of a 'right to relief' requiring or permitting joinder under Rule 19(a) or 20(a) of the Federal Rules of Civil Procedure.

"The California Supreme Court is no more a proper party here than this Court will be when Mr. Halliwell takes his case to the Hague."

613.55 Plaintiff argued on August 18, 1984 at 13 Record 571-572: "The Assembly's opposition to joinder of the California Supreme Court [13 Record 490-491] consists mainly of an effort to belittle the Guaranty Clause of the United States Constitution by equating federal enforcement power against infringement by a state supreme court with the relationship between federal judges and the World Court at the Hague. In re Duncan (1891) 139 U.S. 449 and Chisholm v. Georgia (1793) 2 U.S. 419 clearly affirm that destruction of effective popular sovereignty by abrogation of a state's constitution is a violation of the Guaranty of a Republican Form of Government of Article IV § 4 of the U.S. Constitution. This court may not consider plaintiff's allegation that the California Supreme Court has done this to be credible, but

'on motions by plaintiffs for the addition of a party defendant, the allegations in the motions should be taken as true.' Looper v. Colonial Coverlet Co. (1939) 29 F.Supp.121, 121.

"Where allegations of grave abuse of power are involved, accountability is as important in the judicial as in the executive branch. The following observation, made in reaction to President Nixon's abuse of power, is relevant in the contest of accountability of the California Supreme Court:

> 'If there be no accountability the next president may feel free to do as he chooses, and next time there may be no watchman in the night.' Representative James Mann, Watergate Impeachment Hearing, July 29, 1974."

#631 DOCUMENTATION OF ASSEMBLY DISTRICT POPULATIONS

631.11 Plaintiff contends at 4 Record 7-8:

"At the June 11 hearing Mr. Remcho [Assembly counsel] cited the following passage from [1 Record 131-132] of the inclusive complaint in support of his contention that the population disparities in the Assembly districts were too small to violate the requirements of the equal protection clause of the 14th Amendment:

> 'Only 1/3 of these districts are within the previously used 1% tolerance, two districts are 2%-3% underpopulated, and another is 3% overpopulated.'

In fact, these are the most charitable interpretations of Assembly district population equality that are consistent

with the legal descriptions of the districts in A.B. 300, but Mr. Remcho has treated these figures as maximum disparities even though they are minimum disparities."

631.19 Plaintiff contends at 4 Record 6-7:

"The only reference to corrected Assembly districts in the majority opinion [of Assembly v. Deukmejian] is in footnote 21:

> 'Real parties contend that according to the uncorrected district plans one Assembly district deviates by as much as 15 percent, but concede that the corrected districts are probably within 7 percent of absolute equality.'

The corrected districts to which this statement refers are described in item

#8 of the November 1, 1981 Declaration of T. Anthony Quinn (see Exhibit C-2 [at 1 Record 274] in inclusive complaint), the chief reapportionment consultant of the Assembly minority:

> 'After these striking facts [regarding the huge number and magnitude of errors in A.B. 300] were discovered, I instructed my staff to draw portions of the Assembly plan on official Census Bureau maps. The purpose of this exercise was to ascertain the possible intended location of misassigned census tracts and tract portions. This data was then entered into the computer system and it was determined that the following population deviations may exist in the Bill, even assuming that this assignment was in fact

intended by the Legislature, which, of course, cannot be assumed with any degree of certainty. The following figures are based on those generous assumptions of what the authors intended:

(a) 28 districts are less than 1% from ideal population.

(b) 48 districts are over 1% and within less than 2% of ideal population.

(c) 2 districts are over 2% and within less than 3% of ideal population.

(d) 2 districts are in excess of 3% from ideal population.

(e) The total range of deviation is at least 6.7% (the smallest district is the AD 78 with a population deviation of -3.6% and the largest district

is the AD 25 with a population deviation of +3.1%).'

"Unfortunately Mr. Quinn's generous assumptions regarding the intent of the authors of A.B. 300 never materialized in the revisions that were actually made to the districts. Instead the authors of A.B. 300 took advantage of the technical corrections process to secure additional political advantages. (These substantive changes to A.B. 300 districts are analyzed in [1 Record 190-195] of plaintiff's inclusive complaint.) Since the 7% maximum population disparity conceded by Mr. Quinn refers to a version of Assembly districts which was never implemented, the majority opinion should not have cited Mr. Quinn's 7% estimate in support of Assembly district compliance with the one-person-one-vote principle."

631.23 Plaintiff notes at 4 Record 14: "If Mr. Remcho can demonstrate that his population figures are correct or if the figures are not correct but the Assembly and the Secretary of State are willing to make the corrections needed to bring the maximum and average population deviations down to the levels which are found in Exhibit A of Mr. Remcho's February 25 brief, plaintiff will stipulate that these revised districts adequately satisfy state and federal population equality requirements."

631.31 Plaintiff argued on November 29, 1982 at 6 Record 21-22: "Neither the Assembly nor the Secretary of State has responded to plaintiff's assertion that no statutory authority and no authority in Assembly v. Deukmejian exists for the 277 corrections made after passage of A.B.

300 to the Assembly districts described by A.B. 300. In every previous redistricting specific justifications, approved by the Court, were provided for every single 'technical correction.' Such justifications are essential in this case to evaluation of plaintiff's allegation of bad faith in the process of adoption of the contested districts.

"Because of the unresolved complications produced by the huge number of 'technical corrections' to the Assembly districts, verifying the population claims of the proponents of these districts is an impossible task without a specific listing of all the census population units in each district (as has been provided by Irell & Manella for congressional districts). Plaintiff has pointed to discrepancies between Assembly district populations calculated by the Rose Institute and the official

figures released by the Assembly; these contradictions cannot be resolved without population subtotals which the Assembly refuses to provide."

631.41 Plaintiff contends at 8 Record 165-166:

"THERE IS A HIGH PROBABILITY THAT THE POPULATION CLAIMS OF THE ASSEMBLY ARE INACCURATE ON ACCOUNT OF THE MANNER IN WHICH A.B. 300 WAS DRAFTED.

"Plaintiff has already pointed out one important source of error in A.B. 300 which may have contributed to errors in district populations.

'[S]ecurity precautions for the Assembly apparently were so elaborate that each Assembly member outside the inner circle was shown only a map of his or her own

district. Unfortunately when the time came to put these districts together they didn't quite fit, and the literal provisions of A.B. 300 designate districts with numerous overlaps and intervening gaps.' (1 Record 100-101.)

"Another probable source of population error involves the way in which the Assembly constructed its data base. In Exhibit C-2 (1 Record 274) to plaintiff's inclusive brief Dr. Tony Quinn points out that the Assembly districts in A.B. 300 were drawn using precincts rather than census population units as the original data base. This procedure maximizes the accuracy in determining the political complexion of districts but drastically increases the number of population errors, since population units divided between precincts may be lost

track of and consequently be partially omitted or included twice.

"Moreover, in 8.e. of his declaration Dr. Cain admits that 'In certain cases, it appeared necessary to split an enumeration district in order to ensure population equality among Assembly districts. Such splits are inherently somewhat imprecise, because one cannot be sure of the population in each half after the split.' Dr. Cain does not specify the number of instances where populations were estimated for split units or the procedure which was used for these estimates. In his analysis of split population units in the congressional plan plaintiff has demonstrated (1 Record 121) that misallocation of populations by as little as 10% can create serious errors in population computations. Dr. Cain notes

that only four of the split population units in the A.B. 300 Assembly districts could be reunited 'without upsetting the balance of population equality,' so it is clear that the population figures supplied by James Tucker are untrustworthy if only for this reason alone.

"Plaintiff does not doubt that the Assembly's computers do in fact compute the population figures attested to [at 8 Record 24-25] by James Tucker; but unless the Assembly is willing to provide a printout showing how it arrives at the populations it uses for split census tracts it is impossible to evaluate the accuracy of the Assembly's data base."

631.56 The Assembly contends at 8 Record 308-309:

"The argument that the Assembly's

population figures are probably inaccurate (Plaintiff's Opposition at [8 Record 165-169]) amounts to nothing more than speculation. Mr. Halliwell points to 'security precautions' as 'one important source of error in A.B. 300 which may have contributed to errors in district population.' Opposition at [8 Record 165]:8-18 (emphasis supplied). He provides no evidence of error. [Footnote: Errors in the plan were corrected. The California Supreme Court ordered use of the Legislature's plans as corrected. See Assembly v. Deukmejian, 30 Cal.3d 638, 666, n.22.] Plaintiff contends that use of precinct population figures increases the number of population errors since precincts 'may be lost track of.' Opposition at [8 Record 165:20-166:2] (emphasis supplied). Again, no evidence is provided. He relies on his own analysis of

congressional plans as a basis for speculating that the Assembly figures as to Assembly plans are 'untrustworthy'. Opposition at [8 Record 166]:3-17; see also Opposition at [8 Record 172]."

631.61 Plaintiff summarized the "Unreliability of Tucker Population Figures" at 13 Record 479-480:

"Even if the California Supreme Court had duly authorized the Secretary of State to implement revised versions of 85% of the Assembly districts mandated by Assembly v. Deukmejian the Assembly has not provided any intelligible description of these revised districts, much less proven what the populations of these districts are.

"Item 5 of Dr. Michael Halliwell's Declaration of June 6, 1984 notes

[at 13 Record 181-182] that even Dr. Bruce Cain, a principal architect of the 1981 Assembly plan, admits that it is impossible for any statistician to verify the Assembly's population claims with the materials available to plaintiff.

"Item 6 of Dr. Michael Halliwell's Declaration of June 6, 1984 notes [at 13 Record 182] that the Assembly's population claims are based on population estimates rather than on census data in a number of crucial instances. The Assembly refused to respond to this criticism when it was put forward as a legal argument, and the Assembly continues to evade this issue even though the basic facts have now been incorporated in a sworn affidavit.

"In the Assembly's rebuttal in support of its motion for summary judgment the following criticism is made:

'[Mr. Halliwell] relies on his own analysis of congressional plans as a basis for speculating that the Assembly figures as to the Assembly plans are "untrustworthy."' 8 Record 309. There is good reason for such 'speculation,' since the sole support of the Assembly's population claims is an affidavit by James R. Tucker, and this same James R. Tucker has likewise staked his credibility on the contention that the population disparity in the 1981 congressional plan is only 0.08%. See Affidavit [at 13 Record 132-134] filed by defendant on May 29, 1984."

631.71 Plaintiff argued on June 9, 1984 at 13 Record 148-149: "The Assembly has never directly challenged the validity of Dr. T. Anthony Quinn's figures for the A.B. 300 assembly districts which are found

in Exhibit C-2 of plaintiff's original complaint. (For the convenience of the court and the parties a copy of the computer printout portion of the Quinn affidavit with the key districts marked is attached [at 13 Record 173-174]. Plaintiff includes in this filing his own affidavit [at 13 Record 179-199] which provides documentation for the Quinn population figures.

"Plaintiff's affidavit includes the complete text of corrections to A.B. 300 enacted on September 20, 1981 by cleanup legislation (A.B. 2150) and codified as § 30012 of the California Elections Code. No other corrections to the 1981 assembly plan are acknowledged by West's Annotated California Codes, and none have ever been approved by the Legislature nor the California Supreme Court.

"The maximum population

disparity of 18.92% noted by Dr. Quinn is unaffected by the officially approved corrections to A.B. 300, since this disparity is between 10 AD and 70 AD and neither of these districts is changed by the corrections.

"Plaintiff has also computed the maximum disparity without considering 70 AD, since the legislative intent regarding this district is impossible to determine from the text of A.B. 300. After correcting typographical errors in A.B. 300 where legislative intent can be determined from the descriptions of other districts, the 10.11% population disparity among districts other than 70 AD noted by Dr. Quinn is reduced only slightly to 10.07%."

631.75 Plaintiff contends at 15 Record 268:

"The Assembly submitted no census data of

any kind supporting its alleged populations and provided no subtotals which might have allowed verification of its figures. All that was provided was an affidavit claiming (at 8 Record 18: 'Exhibit A [consisting only of a bare listing of district populations] hereto contains all of the information concerning the actual population of Assembly districts used in California's 1982 general election.' The affidavit supporting Exhibit A (8 Record 21-25) goes into detail about affiant's background but says nothing whatever about how populations were calculated. The only reference to population calculation provided anywhere by the Assembly is in paragraph (e) of the declaration of Bruce Cain, 'Special consultant to the Assembly Committee on Elections and Reapportionment.' (8 Record 39.) This statement notes: 'In certain cases, it

appeared necessary to split an enumeration district in order to ensure population equality among Assembly districts. Such splits are inherently somewhat imprecise, because one cannot be sure of the population in each half after the split. Once the plan was complete, we reunited split enumeration districts where it was possible to do so without upsetting the balance of population equality.'"

#633 VALIDITY OF STATISTICAL CLAIMS BY THE ASSEMBLY

633.11 Plaintiff contends at 4 Record 10-11:

"[T]he Assembly has never provided a population listing by census units such as was filed with the California Supreme Court for the Legislature's congressional districts.

"While it is therefore impossible to check the accuracy of Mr. Remcho's population figures for Assembly districts, I have personally checked the populations of the 35 cities which the proponents of A.B. 300 admit to splitting against the language of A.B. 300 and the January 8, 1982 corrections list; and the gross inaccuracies and distortions in this area cast grave doubt on the reliability of the rest of Mr. Remcho's statistical analysis."

633.21 Plaintiff contends at 4 Record 11-12:

"In Item #11 of the Declaration of James R. Tucker, dated December 29, 1981, which is included in Mr. Remcho's January 25, 1982 [Assembly] brief, it is claimed that 'As corrected, A.B. 300 contains only 23 significant city splits, with 35 splits in all.' . . . Mr. Remcho does list the populations for [five city] fragments [ranging up to 30 persons]. However, the remaining seven of the 12 supposedly insignificant city splits which are not listed in Mr. Remcho's February 25 brief are much larger than the 5 which Mr. Remcho does list; the largest 'insignificant' split has only 3,323 fewer people than the smallest of the 'significant' splits, and the smallest of these unlisted 'insignificant' splits has 6,068 people. The total population of these 7 'insignificant'

fragments of cities is 70,335.

"The Rose Institute lists 9 other city splits (which I have confirmed) that are not acknowledged by the proponents of A.B. 300 and have not been corrected by the January 8 list of 'official' revisions. These cities are Auburn, Bell, El Monte, Industry, Lake Elsinore, Lynwood, Pleasant Hill, Redlands and South El Monte. One of these cities (El Monte) is split three ways. The El Monte split involves 2,360 people (tracts 4321.01 and 4335), which certainly ought to be classified as significant."

633.31 Plaintiff contends at 4 Record 12-13:

"Whether Mr. Remcho [Assembly counsel] is unaware of the number and magnitude of the city splits provided for by his revised version of A.B. 300 is unclear. However, the very misleading nature of

the comments on city splits in his brief certainly undermines the credibility of the unverifiable district populations which are also included in that brief of February 25."

633.33 Plaintiff contends at 4 Record 13-14:

"Richard Nixon's attorney, Mr. James St. Clair, probably was sincere in the statements he made concerning the veracity of the excerpts of the Nixon tapes which he provided, but history has shown that these excerpts were grossly misleading. It is very difficult for someone in Mr. Remcho's position [Assembly counsel] to provide more reliable information than is provided to him by the client he represents. Therefore plaintiff cannot accept as valid any undocumented assertions which Mr. Remcho has made concerning the contested

Assembly districts unless and until he can persuade his client to stop stonewalling plaintiff's legitimate requests for information concerning these districts and their legislative history. Therefore plaintiff hereby revokes the stipulation which he made at the conclusion of the June 11 hearing and reinstates the claims which he made before his discussion with Mr. Remcho during the hearing recess."

633.42 Judge Karlton rules at 4 Record 62:

"At oral argument the plaintiff stipulated that he had no claim under the 'one person, one vote' doctrine regarding the planned use of the newly apportioned State Assembly districts. Subsequently, however, he has filed papers with the court seeking to withdraw that stipulation. He now states

that the stipulation was offered in reliance on information he received at the hearing from counsel for the defendants in intervention Assembly, et al., but that the information he received does not appear to be correct. The Ninth Circuit has summarized the rules regarding stipulations and relief therefrom:

> 'Stipulations are entered into in order to dispense with proof over matters not in issue, thereby promoting judicial economy at the convenience of the parties. 9 J.Wigmore, Evidence §§ 2588, 2597 (3d ed. 1940). Courts thus enforce stipulations as a general rule, absent circumstances tending to negate a finding of informed and voluntary assent of a party to the agreement. Id. at § 2590. A district court's decision to

> relieve a party from a stipulation will not be reversed when the party has entered into it by inadvertence and the opposing party would not be prejudiced (i.e., treated unfairly) by setting the agreement aside.'

United States v. McGregor, 529 F.2d 928, 931-32 (9th Cir. 1976); accord, United States v. Montgomery, 620 F.2d 753, 757 (10th Cir. 1980). In the present case I am satisfied that the stipulation offered at oral argument by Mr. Halliwell was due to inadvertence, and that such inadvertence is particularly understandable in light of the fact that he is litigating a complex case in propria persona. More important, I can see no sense in which the defendants in intervention Assembly, et al have been prejudiced by the offer

of stipulation, its acceptance, and its subsequent withdrawal. The court therefore will permit the plaintiff to withdraw from the stipulation entered into at oral argument."

633.56 The Assembly contends at 8 Record 8-9:

"Because [the 1982] election is over, the population of the Assembly districts used in it is a matter of historical fact that cannot be genuinely disputed.

"The 'ideal' population of a California Assembly district is 295,857, determined by dividing the state's total population by the number of Assembly districts. Exhibit A [at 5 Record 472-473] shows the actual population figures for each Assembly district in California. The districts, with populations as shown in Exhibit A, are those that were used

in the November 1982 California election.

"As the percentage figures contained in Exhibit A to the Tucker Declaration show, the population of every Assembly district used in November 1982 was within 2% of the ideal. The smallest district (AD 56) is 1.98% smaller than the ideal, and the largest (AD 51) is 1.94% larger than the ideal. Id. The maximum range of variation is thus 3.92%, with a ratio of largest to smallest district of 1.005:1. The mean deviation from the ideal is -.05%, and the median deviation is -.22%."

633.61 Plaintiff contends at 8 Record 169-172:

"THE ASSEMBLY HAS NOT RESPONDED TO PLAINTIFF'S WELL-DOCUMENTED REFUTATIONS OF STATISTICAL DATA PROVIDED BY THE ASSEMBLY.

"At [8 Record 9] lines 21-22 of

its Points and Authorities the Assembly alleges that plaintiff has never contested the accuracy of the Assembly's population claims. Plaintiff has indeed disputed the accuracy of the Assembly's population figures; at 4 Record 10 plaintiff notes,

> 'The 25 A.D. may be taken as an example of what discrepancies may exist, since it was involved in a dispute over Voting Rights Act compliance so the Rose Institute carefully checked the census units assigned to it by A.B. 300 and Mr. Remcho's corrections list. The Rose Institute determined that this district's population is 304,975 (cf. "Redistricting California 1981: Statistics"). In Exhibit A of a brief mailed to plaintiff by Mr. Remcho's firm on February 25,

> 1982 [same as 8 Record 24-25] the population listed for 25 A.D. is 300,093 -- almost 5,000 less than the Rose Institute figure which places this district more than 3% above the ideal Assembly district population.'

Even though the Assembly is now moving for a summary judgment it has never sought to rebut this nor any other of plaintiff's criticisms of statistics supplied by the Assembly.

"At 4 Record 10 plaintiff also notes,

> 'It would be extremely time consuming to analyze all the Assembly districts as thoroughly as the 25 A.D. was done by the Rose Institute, and even if such an extensive analysis were done it would be impossible to

> determine where the Assembly's population figures don't coincide with those compiled by the Rose Institute and thereby independently determine which set of figures is correct, because the Assembly has never provided a population listing by census units such as was filed with the California Supreme Court for the Legislature's congressional districts.'

Although the Assembly recognizes that the party moving for summary judgment must bear the burden of proof it has yet to provide any documentation of its population claims for Assembly districts.

"Instead the Assembly has taken the position (at [8 Record 13] lines 14-26 of its Points and Authorities) that the accuracy of its population figures no longer matters. However, it is

universally accepted that passage of new-legislation which does not eliminate previously existing constitutional flaws does not in any way deflect a legal attack on the continuing constitutional infirmities. It is as impossible to assess the constitutional compliance of the Chapter 8 Assembly districts from the enacting legislation as it is to analyze the districts set forth in A.B. 300, since these new districts are described in much the same terms. (Two examples of the obscure geographic references which are included in both bills are found at 6 Record 320. There one finds census tract 141 divided along 'State Highway 1, as it was aligned on August 30, 1973' and enumeration district 422 of census tract 9 split along a line 'located east of Bert-Crane Road and Dan McNamara Road and Sandymust Road and Nickel Road and Turner Island Road.')

"Even though plaintiff requested maps and population figures for the new districts embodied in Chapter 8 1983 Cal. Stats. First Extraordinary Session on February 16, 1983 from the Assembly elections and reapportionment committee, the Assembly has not provided either maps or population figures. The new Assembly E and R committee chairperson, Ms. Maxine Waters, is not a party to this action, but counsel for Assembly must provide documentation on the new districts if it wishes to use the existence of these districts as an argument in support of its motion for a summary judgment. Chapter 8 was enacted more than four months ago, and the failure of the Assembly to produce either maps or population figures which can be used to verify constitutionality suggests that these Assembly districts contain the same sort of gross drafting

errors as A.B. 300."

633.71 Plaintiff contends at 8 Record 172-174:

"PROPONENTS OF THE LEGISLATURE'S REDISTRICTING PLANS HAVE PROVIDED INACCURATE AND MISLEADING POPULATION DATA.

"In Assembly v. Deukmejian the proponents of the Legislature's congressional redistricting plan submitted an affidavit by Dr. Leroy Hardy (very similar in its lack of documentation to that of James Tucker) which purported to show only very small population disparities among congressional districts. The accuracy of these congressional district populations was challenged by the Rose Institute (see Exhibit C-1 to plaintiff's inclusive brief, 1 Record 274), so Irell and Manella (attorneys for the proponents of A.B. 301) submitted

a listing of the population units from which their district populations were derived.

"Plaintiff used this population compilation to demonstrate (see 1 Record 119-129) that the population disparity between the largest and smallest congressional districts was more than twenty times larger than that claimed by Dr. Hardy. While the Assembly may well believe that the population figures provided by James Tucker are accurate they obviously are reluctant to put this belief to the test and thus risk the sort of refutation of their population claims that befell the proponents of the Legislature's congressional redistricting plan.

"But there are also serious errors even in those population statistics which <u>have</u> been provided by the Legislature for its Assembly

redistricting plan. These errors involve the ratio of largest to smallest district, the mean deviation, and the median deviation, statistics which are key factors in assessing compliance with one-person-one-vote requirements. At [8 Record 9] lines 11-13 of its Points and Authorities the Assembly claims that the ratio of largest to smallest district is 1.005:1, the mean deviation is -.05% and the median deviation is -.22%. All of these claims are inconsistent with the populations alleged by the Assembly. According to Mr. Tucker, 51 A.D. has a population of 301,601 and 56 A.D. has a population of 290,005. The ratio between these populations is 1.040:1, not 1.005:1; thus the relative population disparity is understated by a factor of eight. The mean deviation from the ideal for the populations alleged in Exhibit A is

0.99%, not -.05%; thus the Assembly is off by a factor of twenty in this calculation. Apparently the Assembly figures that the aggregate negative deviation should be subtracted from the aggregate positive deviation before the average deviation is completed; this procedure will always produce an average deviation of exactly zero (except for discrepancies produced by rounding), no matter how large or small population deviations are. The median deviation of -.22% assumes that all negative deviations in excess of -.22% are actually smaller than -.22%; when the median is properly calculated according to size of deviation it is 1.02%, or nearly five times as large.

"In every aspect of its data analysis the Assembly has sought to create a misleading impression by citing isolated facts out of context. When the

facts taken out of context are also accidentally misreported (see preceding paragraph) the Assembly slips across the line between evasive statements and outright falsehoods. When population disparities for the contested Assembly districts can be verified plaintiff has no way of knowing whether they will turn out to be five, eight or twenty times as large as claimed; but in view of the magnitude of the Assembly's previous statistical errors plaintiff surely is justified in insisting upon documented proof of the Assembly's population claims."

633.86 The Assembly contends at 8 Record 310-311:

"Even viewed from Mr. Halliwell's perspective, the population variances here to not create a prima facie case of violation of the Equal Protection

Clause. [Footnote: Mr. Halliwell contends that the 1981 redistricting plan adopted by the Legislature was illegally corrected to satisfy the requirements of population equality. Plaintiff's Opposition at [8 Record 163-165]. The corrections of technical errors were both statutorily authorized, see Cal. Elec. Code § 30000, and presented to and accepted by the California Supreme Court, see Declaration of Joseph Remcho in Support of Assembly's Motion for Summary Judgment and attachments thereto [8 Record 17-82]. See also Assembly v. Deukmejian, 30 Cal.3d 638, 666 and n.21 (1982). In any event, plaintiff has no federal claim based on the procedure by which they were implemented. See Order, July 1, 1982 at [4 Record 46-47].] At

[8 Record 173] of his Opposition, Plaintiff argues that percentage deviations from the ideal are larger than those stated at [8 Record 9] of the Assembly's Memorandum in support of its Motion. Without commenting on or conceding the accuracy of the numbers derived by Mr. Halliwell, we note that even his figures do not amount to a prima facie case of constitutional violation. Plaintiff contends that the Assembly districts have a mean deviation from the ideal of 0.99%, and a median deviation of 1.02%. In Gaffney v. Cummings, 412 U.S. 735 (1973), the Supreme Court held that no prima facie violation of the one person-one vote requirement existed where the mean deviation for State Assembly districts was 1.8% and the median deviation was 1.9%. 412 U.S. at 303. In White v. Regester, 412 U.S. 755 (1973), a mean deviation of 1.82%, with a total

variation of 9.9% was held not to establish a prima facie constitutional violation. 412 U.S. at 764. Mr. Halliwell does not dispute the 3.92% total variation figure shown by the Assembly, but even the figures he puts forward for mean and median variance are smaller than those held inadequate to state an equal protection claim.

"Mr. Halliwell also challenges the Assembly's ratio of largest to smallest district, claiming correctly that the ratio is 1.04 to 1. [Footnote: A computational error resulted in the 1.005:1 ratio set out at [8 Record 9] of the Assembly's Memorandum in support of its Motion for Summary Judgment. The Assembly apologizes to the Court and the plaintiff for the error.] In Gaffney, supra, the ratio of largest to smallest Assembly district was [1.082]

to 1, yet no prima facie claim was stated against the reapportionment plan. 412 U.S. at 737 n.2.

"Plaintiff has cited no authority for his contention that deviations of even the magnitude he claims exist constitute a prima facie constitutional violation. In light of the compelling authority to the contrary, the Assembly is entitled to judgment as a matter of law."

633.89 Plaintiff contends at 11 Record 534-536:

"[According to the Assembly]: 'At page 15 of his Opposition, plaintiff argues that percentage deviations from the ideal are larger than those stated at page 6 of the Assembly's memorandum in support of its motion. Without commenting on or conceding the accuracy of the numbers derived by Mr.

Halliwell, we note that even his figures do not amount to a prima facie case of constitutional violation. Plaintiff contends that the Assembly districts have a mean deviation from the ideal of 0.99% and a median deviation of 1.02%.' (8 Record 310.) In his brief of December 6, 1983 at [10 Record] 185 plaintiff cites Flanagan v. Gillmor (1982) 561 F.Supp. 36, 40 n. 8, which confirms that the method used by plaintiff to calculate average percentage deviations (by ignoring signs) is the one recognized by the U.S. Supreme Court. The Assembly does not wish to comment on this because its own procedure is deliberately misleading and has never been used by any court in a redistricting case. Had one taken the claims of the Assembly at face value, a mean deviation of -.05% and a median deviation of -.22% would have appeared

from White v. Regester (1973) 412 U.S. 755, 764 to be below the threshold for prima facie violations of one person, one vote requirements in state legislative districts. Since the ideal district population in Regester was almost exactly four times smaller than in the California situation, the 1.8% mean deviation in the Texas case would correspond to 0.45% in the A.B. 300 districts and the 1.9% median deviation to 0.48%. Thus the deliberately understated value of -.05% for the mean deviations seems, once differing state circumstances are taken into account, to be nine times less than needed to establish a prima facie case; and the likewise miscalculated -.22% for the median deviations seems to be twice as small as the prima facie threshold. However, using the actual mean deviation of 0.99% and a median deviation of

1.02%, it is apparent that once different state circumstances are taken into account, both values are more than double that needed to establish a prima facie violation under the Regester standard.

"The Assembly continues: 'Mr. Halliwell also challenges the Assembly's ratio of largest to smallest district, claiming correctly that the ratio is 1.04 to 1. A computational error resulted in the 1.005:1 ratio set out at page 6 of the Assembly's memorandum in support of its motion for summary judgment. The Assembly apologizes to the Court and the plaintiff for the error.' (8 Record 311.) In Gaffney v. Cummings the ideal district population was about fifteen times smaller than in the California situation, so adjusting for the smaller populations of the Connecticut districts would make the 1.082 ratio of

largest to smallest districts comparable to 1.0055 in the A.B. 300 districts. Thus once again the erroneous value supplied by the Assembly is below the prima facie violation threshold, taking state circumstances into account, while the true value of 1.040 is far above the threshold.

"It is worth noting that in [the Assembly brief] (at 8 Record 9), where the erroneous mean deviation, median deviation and largest-to-smallest ratio are set forth, plaintiff's skepticism about the validity of the Assembly's population claims is ridiculed as being based on 'not one shred of evidence.' If anything at all was learned from the discrepency between the transcripts of the tape recordings provided under sworn affidavit and the actual recorded conversations among the conspirators in the Watergate episode,

it is that in a conspiracy case no court should trust indirect evidence when those charged with complicity in the conspiracy have direct evidence which they refuse to provide."

#854 JURISDICTIONAL STATUS OF PLAINTIFF'S APPEALS

854.22 The Senate argued on June 16, 1984 at 13 Record 206-207:

"Defendant/Intervenor The Senate of the State of California, appellee herein, pursuant to Rule 14.2 of the Supreme Court of the United States, moves the court for an order dismissing the appeal taken by the plaintiff from the judgment entered hereon on March 24th, 1984, by notice of appeal filed April 16th, 1984, with such allowance of costs as may be just, on the ground that more than sixty days have elapsed since filing of said notice of appeal, and said appeal has not been docketed in the Supreme Court of the United States, nor has an order been obtained enlarging the time for docketing said appeal, as required by Rule 12.2 of the Supreme Court of the United States."

854.27 Plaintiff argued on June 23, 1984 at 13 Record 273-274: "Plaintiff's appeal from the aspects of the order of March 27, 1984 noted in his April 16, 1984 notice of appeal has been greatly delayed by the process of transcript preparation for the February 16, 1983 hearing on senate district misnumbering. However, this transcript now is available and plaintiff has been informed that the Court of Appeals has been notified and that 'they will be notifying you when your briefing schedule is due.' See [13 Record 277].

"The senate seeks to invoke a rule of the Supreme Court which is applicable only to direct appeals pursuant to 28 U.S.C. § 1253. Since this panel denied plaintiff's motion for injunctive relief from the effects of senate district misnumbering on equitable rather than constitutional grounds, MTM, Inc.

v. Baxley (1975) 420 U.S. 799 precludes a direct appeal to the U.S. Supreme Court:

> 'a direct appeal will lie to this Court under § 1253 from the order of a three-judge federal court denying interlocutory or permanent injunctive relief only where such order rests upon the resolution of the merits of the constitutional claim presented below.' 420 U.S. at 804.

When Eugene McCarthy attempted a direct appeal from the refusal of a three-judge panel to place his name on the Texas presidential ballot Justice Powell (in chambers) cited MTM v. Baxley supra and rejected the application on jurisdictional grounds. See McCarthy v. Briscoe (1976) 429 U.S. 1316. A similar position

was taken by Justice Marshall (in chambers) in Fishman v. Schaffer (1976) 429 U.S. 1325.

"Plaintiff has sought authorization for a direct appeal notwithstanding MTM v. Baxley on the grounds that the congressional intent which was the basis for that ruling was changed by the 1976 amendments to 28 U.S.C. § 2284. See Motion #2 [at 13 Record 68-74] of plaintiff's May 19, 1984 'Application to Justice Rehnquist Seeking Clarification of His Ruling of May 7, 1984.' However, in spite of this application and plaintiff's renewed effort on June 11, 1984 to obtain a ruling on this subject plaintiff has been unable to secure any jurisdictional clarification from the U.S. Supreme Court. Plaintiff has been informed by Ms. Katherine Downs, an assistant clerk of the U.S. Supreme Court, see [13 Record 278] that the

denial of his motion of April 27, 1984 (see 12 Record 431-436) (which was converted into an application under Supreme Court Rule 43) precludes any subsequent application seeking clarification. In these circumstances plaintiff has no choice but to treat MTM v. Baxley as the authoritative governing precedent and proceed accordingly."

854.31 Plaintiff argued on August 3, 1984 at 13 Record 473-474:

"The Assembly's opposition to reconsideration opens with an extended analysis of the procedural status of the case. The Assembly's analysis is based upon the notion that a litigant has a choice between appealing to the Ninth Circuit or to the U.S. Supreme Court. Plaintiff has set forth in his notices of appeal his own opinion as to the proper avenues for appeal for vari-

ous aspects of the order of March 27, 1984, but it now appears that the Ninth Circuit feels that any appeal should go to the U.S. Supreme Court, while plaintiff's motion to the U.S. Supreme Court to affirm this has been denied. A deputy clerk of the Eastern District informed plaintiff on June 13, 1984 that he would be notified by the Ninth Circuit 'when your briefing schedule is due,' but no such notification has been received. An assistant clerk of the U.S. Supreme Court has repeatedly refused to forward plaintiff's requests for procedural clarification.

"In discussing the quagmire in which plaintiff's appeal is now stuck, Wright & Miller note in Federal Practice and Procedure § 4235:

> 'The 1976 legislation did not change the statutory provision that any party may appeal

to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in an action required by Act of Congress to be heard and determined by a district court of three judges. In the years immediately prior to 1976 the court, in an effort to rid itself of as many direct appeals as possible, had developed a bewildering and constantly changing variety of rules on what orders were directly appealable to it and what were reviewable in the courts of appeals. [Footnote cites six cases under the heading of 'Bewildering Rules'.] With three-judge courts now virtually eliminated, it is to be hoped

> that the provisions for direct appeal will be given a straightforward reading shorn of the complications introduced by the recent cases.' Id. at 406-407.

If this court allows reconsideration, plaintiff's recently submitted affidavits and discovery requests will provide a factual foundation for resolution of all of the underlying constitutional issues. A revised order granting or denying injunctive relief on constitutional grounds will extricate the case from this quagmire and avoid the 'bewildering rules' governing appeals from orders denying injunctive relief for non-constitutional reasons."

#861 OCTOBER 27, 1982 APPLICATION TO JUSTICE REHNQUIST

861.11 Plaintiff wrote Chief Deputy Clerk Lorson on October 27, 1982 at 4 Record 486:

"Because the three-judge panel reversed its decision and granted me my first hearing before it after I filed a notice of intention to request an injunction from the Supreme Court, my request to the Supreme Court will be submitted only after that hearing later today. I expect that you will receive it no later than Friday, October 29.

"To facilitate the emergency consideration this request will require, I enclose two copies of material which will be incorporated in my formal request to the Supreme Court. These 'advance copies' are also being served on all parties in Halliwell v. Eu at the

hearing today."

861.21 Plaintiff filed with the U.S. Supreme Court and the parties to this action on October 27, 1982 a document labelled as follows at 5 Record 254:

"SUMMARY OF MAJOR CLAIMS of Plaintiff in Halliwell v. Eu - Advance copy - formal motion to be filed after District Court hearing on October 27, 1982."

861.31 Plaintiff notes at 11 Record 241:

"[W]hen plaintiff called Francis J. Lorson, Chief Deputy Clerk of the U.S. Supreme Court, just before the close of business in Washington, D.C. on Monday, November 1, [1982] Mr. Lorson informed Plaintiff that Justice Rehnquist, acting the previous Friday on

Plaintiff's written proposal, had denied the request for an injunction to halt California's congressional and state legislative elections which Plaintiff had withdrawn at the October 27, 1982 hearing. See 5 Record 493 for letter of confirmation."

861.41 Plaintiff contends at 11 Record 239-242:

"Since the Court had not ruled on the motion actually presented by plaintiff at the October 27 hearing and since 'Ordinarily an appellate court does not give consideration to issues not raised below.' Hormel v. Helvering (1941) 312 U.S. 552, 556, plaintiff sought a ruling from this court on November 1, 1982 so he could appeal to the United States Supreme Court. Since this Court had expressed concern that any pre-election modifica-

tion in the election process 'would create sufficient confusion as to discourage many voters from going to the polls at all,' plaintiff modified his proposal to propose simply embargoing release of election returns until the Court had decided on an appropriate standard of comparison for validating the results of congressional and state legislative contests.

"In the motion submitted on November 1, 1982 plaintiff argued:

> 'A major motivation for the "run-out-the-clock" strategy to prevent judicial consideration of this case on its merits before the November 2 election [see 5 Record 260-266] has been the wish to avoid a determination of the constitutionality of the districts which have been

foisted upon California voters even though they have resoundingly rejected all three sets of districts. This "run-out-the-clock" strategy employed by the advocates of the Legislature's redistricting plans has been so spectacularly successful that no state or federal court has EVER ruled on the constitutionality of these plans even though there is overwhelming proof in the case record of their unconstitutionality. The fundamental issue in this case thus has become whether it is constitutional to disregard State and Federal Constitutions in a matter of critical importance to California's institutions of representative democracy.

'The strategy of endless delays in enactment and adjudication has succeeded because so many people have wished to avoid causing embarrassment to those responsible for the present situation. Judges themselves are not politically neutral; therefore due process of law must avoid "every procedure which would offer a possible temptation to the average man as a judge." In re Murchison (1955) 349 U.S. 133, 136. Indeed, it would be very difficult to find any California judges who do not have strong preferences in various congressional and state legislative contests. Given the existence of such preferences it would be very difficult to avoid

> being influenced in one's decisions concerning proper remedies for the present situation when the impact of the various remedies on particular candidates is known.' (5 Record 401-402.)

Although plaintiff's request to appear in support of his proposal to embargo election returns was denied, this Court did agree to provide a written opinion supporting its disposition of this motion.

"Plaintiff had been informed that his request for an embargo on election returns was denied, but the written opinion was not yet available when plaintiff called Francis J. Lorson, Chief Deputy Clerk of the U.S. Supreme Court, just before the close of business in Washington, D.C. on Monday, November 1. Mr. Lorson informed plain-

tiff that Justice Rehnquist, acting the previous Friday on plaintiff's written proposal, had denied the request for an injunction to halt California's congressional and state legislative elections which plaintiff had withdrawn at the October 27, 1982 hearing. See 5 Record 493 for letter of confirmation.

"Plaintiff appreciates the fact that in these circumstances the Court's clerical staff made an all-out effort to complete typing of the Court's written opinion of November 1, 1982 so that plaintiff might still seek Supreme Court approval of his proposal for a delay in the release of election returns. The Court's staff worked overtime to complete preparation of the opinion but missed the Federal Express deadline for overnight delivery to Washington by about 30 minutes.

"Plaintiff recognizes that,

under the appropriate standard of review, he faced an uphill fight even if the opinion of November 1, 1982 had been prepared in time to permit a pre-election appeal to Justice Rehnquist. As Justice Powell, acting in his capacity as Circuit Judge in Graves v. Barnes (1972) 405 U.S. 1201, 1203 notes:

> 'Stays pending appeal to this Court are granted only in extraordinary circumstances. A lower court judgment, entered by a tribunal that was closer to the facts than the single Justice, is entitled to a presumption of validity. Any party seeking a stay of that judgment bears the burden of showing that the decision below was erroneous and that the implementation of the judgment

pending appeal will lead to irreparable harm.'"

861.52 Chief Deputy Clerk Lorson notes on October 29, 1982 at 5 Record 493:

"[Plaintiff's] application for injunction has been presented to Justice Rehnquist, who has endorsed thereon the following:

'Denied

W.H.R.

10/29/82.'"

#864 FEBRUARY AND MARCH 1984 MOTIONS TO JUSTICE REHNQUIST

864.21 Plaintiff, in his February 14, 1984 "Request for Procedural Clarification" argued at 12 Record 37-37:

"Even if the Supreme Court decides not to take steps to facilitate its own consideration of an appeal and declines to decide without a formal petition whether to request briefing by the parties regarding interlocutory intervention, some guidance to plaintiff, as authorized by Haines v. Kerner (1972) 404 U.S. 519, 520 for non-lawyers conducting their own cases, is requested on the following points:

1) How much longer must plaintiff wait for the District Court to take action on his motions under advisement for a year before the U.S. Supreme Court is willing to consider intervention in

the case?

2) How much longer can plaintiff wait for the lower court to decide the constitutional issues in his case without jeopardizing his right to post-election relief if the lower court's judgment is found by the U.S. Supreme Court to be erroneous?

3) If plaintiff complies with all court rules regarding the content of briefs, may he file a motion and supporting briefs regarding those aspects of the case requiring urgent consideration because of the elections calendar under the provisions of Rule 39 (setting forth the format for the form of typewritten papers) rather than the provisions of Rule 33 (setting forth the format for printed documents)?"

864.31 Plaintiff argued in his March 20, 1984 application to Justice

Rehnquist at 12 Record 167-168: "Since the district court has not taken even the initial steps toward an adjudication of the merits of plaintiff's constitutional claims (see accompanying Memorandum Regarding Procedural Problems, [12 Record 49-132]), plaintiff asks merely for the enforcement of 28 U.S.C. § 2284. In Part I [12 Record 169-170] of this application plaintiff requests action to ensure that a proper factual record is compiled regarding constitutional defects in the contested districts and their mode of enactment. In Part II [12 Record 171-175] of this application plaintiff asks that a specific time frame be established for the consideration of his long-pending proposals for injunctive relief (see [12 Record 134-161]) in order to minimize further delay in adjudication and minimize the disruptive consequences of remedying the

constitutional defects in the contested districts.

"In Part III [12 Record 176-179] of this application plaintiff calls attention to a pattern of widespread refusal by state and federal courts in California to accord due process of law in politically sensitive redistricting cases and urges the Supreme Court to take steps to restore public confidence in the political even-handedness of the judicial process.

"Finally, plaintiff asks the Court to give whatever directions regarding the future conduct of the case it deems necessary in order to set the case on a correct procedural path."

864.41 Plaintiff in his March 20, 1984 application to Justice Rehnquist summarized the "Need to Compile an Adequate Factual Record" at

12 Record 169-170:

"Because the Judge to whom Halliwell v. Eu was originally assigned has resolutely imposed his own predilections concerning the proper scope of this politically sensitive case (contra: Swift & Company v. Wickham (1966) 382 U.S. 111, 119), defendants have been able to avoid any responsive pleading, much less factual rebuttal, to any but a tiny portion of plaintiff's allegations concerning constitutional defects in the contested districts and their mode of enactment. For details concerning Judge Karlton's sua sponte dismissals without leave to amend which led to this situation and the nature of the constitutional claims which have been excluded from consideration by these dismissals see [12 Record 58-89] of plaintiff's supplemental memorandum, Appendix 4 infra. Plaintiff has tried

without success to persuade the panel now conducting this case to apply the standards established by Oneida Indian Nation v. County of Oneida (1974) 414 U.S. 661, 666-667 and Goosby v. Osser (1973) 409 U.S. 512, 518 concerning the definition of jurisdictionally substantial claims.

"The possibility of an adverse decision has generally been sufficient to persuade the parties in federal lawsuits '[to] sharpen the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' Baker v. Carr (1962) 369 U.S. 186, 204. However, two years of inaction by the district court has caused defendants to conclude that they need not be concerned about such a possibility. Not only have they not responded to plaintiff's allegations concerning the as-

pects of the case which Judge Karlton has excluded from consideration (see accompanying motions submitted to the district court at [12 Record 143-145], Appendix 5 infra), they have also refused to respond to plaintiff's requests for maps, legal descriptions and population data needed to document characteristics of the contested districts [12 Record 139-142].

"In Norris v. Alabama (1935) 294 U.S. 587, 590 the Supreme Court ruled:

> 'When a federal right has . . . [not been] denied in express terms but . . . was denied in substance and effect . . . it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured.'

Since the necessary facts must be in the

case record if the Supreme Court is to analyze them and since the protracted delay in adjudication by the district court may constitute a denial in substance and effect by the district court of federally protected voting rights, Norris v. Alabama supra supports interlocutory action by the Supreme Court to ensure the compilation of an adequate case record to provide the basis for the High Court's own final determination on the merits in Halliwell v. Eu as provided by 28 U.S.C. § 2284. Plaintiff therefore requests that, if an appropriate briefing schedule is not promptly established by the district court to provide evidence needed to evaluate plaintiff's factual allegations, Justice Rehnquist enter an order establishing such a schedule or recommend this action to the full Court."

864.51 Plaintiff argued in his March 20, 1984 motion for "Enforcement of Expedited Consideration Requirement of 28 U.S.C. § 2284" at 12 Record 171-175:

"The nomination of California's congressional and state legislative candidates in 1984 is scheduled to take place in June on the date of the presidential primary, and if congressional and state legislative primaries must be repeated at a later date because of serious constitutional defects in the districts used (or if the results are allowed to stand in spite of such defects) irreparable damage to the rights of some voters will certainly occur. Four proposals for injunctive relief to remedy constitutional defects in California's congressional and state legislative districts are set forth at [12 Record 146-158] of plaintiff's long-

pending motions on which the district court has refused to act (Appendix 5 infra).

"The authority of the Supreme Court under 28 U.S.C. § 1291 to grant interlocutory review to preserve time-bound rights is discussed at [12 Record 197-201] of the memorandum regarding the rejection of plaintiff's prior applications, Appendix 3 infra. The principle expounded by Justice Blackmun in McDonald v. Missouri (1984) 78 L.Ed. 2nd 538, 540, that review by the Supreme Court must take place before events render such review meaningless, is also applicable to elections cases even though the ruling concerns a stay of execution in a capital case. In McDonald Justice Blackmun criticizes the Missouri Supreme Court for failing to apply the principle that justice delayed is justice denied in such an obvious situation and admon-

ishes the lower court that 'if it fails to fulfill its responsibility, I shall fulfill mine.' Id. It certainly would seem that a single Justice, faced with a district court that simply refuses to act on a redistricting lawsuit as elections come and go using the contested districts, could fairly follow Justice Blackmun and act himself to ensure that the fundamental rights involved are adjudicated in time to make a difference.

"This principle was recently applied in a case involving the redistricting of the Boston city council. In Latino Political Action Committee v. City of Boston (1983) 568 F.Supp. 1012 the district court ordered modifications to a redistricting plan because inaccuracies in the procedures used to calculate district populations had produced unacceptable population disparities among districts. (The court ruled: 'Good

faith cannot displace the one person, one vote requirement.' Id. at 1017.)

The court noted that

> 'It is too late in the day to argue that federal courts are not under a duty to ensure that rights under the Constitution and laws of the United States are not denied by state or municipal governments. While the apportionment task is primarily a political and legislative process, it must operate within constitutional parameters.' Id. at 1019.

The court continued,

> 'In Sims the Supreme Court acknowledged that under certain circumstances, equitable considerations might justify a court in withholding immediate relief even though an appor-

tionment scheme is found invalid. Sims in no way requires a Federal court to allow an illegal election.' Id. at 1020.

"In Belotti v. Latino Political Action Committee (1983) 77 L.Ed.2d 1421 Justice Brennan refused to stay the judgment of the district court. Justice Brennan noted:

'The general principles that guide my consideration as a circuit Justice of this application are well settled:

"Relief from a single Justice is appropriate only in those extraordinary cases where the applicant is able to rebut the presumption that the decisions below -- both on the merits and on the proper interim disposition

> of the case -- are correct. In a case like the present one . . . . it may be appropriate to 'balance the equities' -- to explore the relative harms to applicant and respondent, as well as the interests of the public at large." [Citation.]' Id. at 1422-1423.

But Justice Brennan ruled,

> 'I have concluded that the inconvenience and delay imposed by the District Court's requirement that the districting plan be revised before elections can go forward are not so great as to warrant a stay of judgment of the District Court.' Id. at 1423.

Justice Brennan also noted, '[N]or is there, in my judgment, a fair prospect

that a majority of the Court will conclude that the decision below was erroneous.' Id. at 1423.

"The issues in Latino Political Action Committee supra are very similar to those in Halliwell v. Eu except that the plea of the petitioner here is for action rather than a stay of action by the lower court. Petitioner's burden of proof is readily satisfied when he seeks relief simply from refusal of the lower court to decide at all, since the case was filed more than two years ago. It is likewise easy to demonstrate that refusal of the District Court to even consider plaintiff's motions for injunctive relief relating to the 1982 elections for more than eight months prior to the elections, its refusal to rule on revised proposals for post-election relief for nearly one and a half years after the elections, and its

refusal to even allow briefing on motions for injunctive relief relating to the 1984 elections -- although plaintiff filed these motions more than three months ago -- is not a proper interim disposition.

"In Baker v. Carr (1962) 369 U.S. 186, 219 the opinion notes: 'A decision for the plaintiff would inevitably have produced some significant measure of chaos, a consequence to be avoided if it could be done without abnegation of the judicial duty to uphold the Constitution.' However, the potential for disruption of the California elections process can only be increased by still more delay in consideration of plaintiff's long-pending motions for injunctive relief. Therefore plaintiff asks that, unless the district court promptly grants plaintiff's request that it establish a suitable time frame with-

in which it will rule on plaintiff's long-pending motions (see plaintiff's Motion VIIB at [12 Record 159] of motions submitted to the district court, Appendix 5 infra), Justice Rehnquist enter an order establishing a deadline for action on these motions by the lower court."

#866 REFUSAL OF CLERKS TO TRANSMIT PLAINTIFF'S APPLICATIONS

866.11 Plaintiff argued in his March 20, 1984 application to Justice Rehnquist at 12 Record 167: "Halliwell v. Eu is a challenge to California's current congressional and state legislative redistricting plans, adjudication of which defendants have been allowed to prevent for more than one two-year elections cycle.

"On January 27, 1984 and again on February 14, 1984 plaintiff made application to the Circuit Justice for the Ninth Circuit seeking enforcement of the expedited consideration requirement of 28 U.S.C. § 2284, but in both instances deputy clerks refused to transmit these applications to Justice Rehnquist. See [12 Record 183-232] for an analysis of the issues raised by the rejections of plaintiff's prior applica-

tions. Because of the ongoing elections process leading to June primaries in California and the continuing refusal of the district court to act at all, corrective action to enforce procedural requirements for state-wide redistricting cases is now a matter of utmost urgency."

866.17 Plaintiff argued in his March 20, 1984 "Memorandum Regarding Refusal of Court Clerks to Transmit Plaintiff's Applications to Justice Rehnquist Pursuant to Rule 43" at 12 Record 189-190:

"This memorandum explains the authority of the Supreme Court to intervene at once in Halliwell v. Eu, a politically sensitive constitutional challenge to California's congressional and state legislative redistricting plans upon

which the lower court has avoided adjudication while state elections have come and gone and now approach again.

"Section I [12 Record 191-196] discusses the authority of the Supreme Court to act to enforce the requirements of jurisdictional statutes, specifically 28 U.S.C. § 2284, which requires expedited consideration of statewide redistricting cases by the lower court.

"Section II [12 Record 197-201] demonstrates that 28 U.S.C. § 1291 allows interlocutory review when protracted delays in adjudication foreclose the possibility of effective injunctive relief.

"Section III [12 Record 202-208] notes the special priority of voting rights cases and the obligation of all courts to conduct their proceedings in a manner which ensures the en-

forceability of constitutional protections for these rights.

"Section IV [12 Record 209-215] outlines an additional ground for Supreme Court intervention, the damage to the reputation of California's courts caused by a widespread refusal of Democratic appointees handling California redistricting cases to adjudicate constitutional challenges to redistricting plans which provide built-in advantages for Democratic candidates.

"Section V [12 Record 216-225] itemizes misapplications of the Rules of the Supreme Court which have led to wrongful rejection of plaintiff's two prior applications seeking enforcement of procedures applicable to voting rights cases. This section concludes [at 12 Record 226-227] by requesting that the clerks of the Supreme Court now act so as to avoid the loss of more

of the critically important time remaining before the California elections in June (1) by permitting plaintiff to perfect his application if necessary and (2) by transmitting plaintiff's applications and supporting documents to Justice Rehnquist."

866.23 Plaintiff contends at 12 Record 202-208:

"A redistricting case probably has an immediate effect on the vital rights of more people than any other type of litigation. In Wesberry v. Sanders (1964) 376 U.S. 1, 17 the Court recognizes the importance of providing effective protection of these rights.

> 'No right is more precious in a free country than that of having a voice in the election of those who make laws under which, as good citizens, we

must live. Other rights, even the most basic, are illusory if the right to vote is undermined.'

"Former Justice Tom C. Clark, in the Foreword to Wright & Miller's Federal Practice and Procedures, writes:

'Chief Justice Warren has noted, "As long as people cannot get their rights enforced it makes little difference whether the substantive law is good or bad." The federal rules are designed to give every right an effective remedy.'

"Accordingly courts have a duty to adjudicate cases involving voting rights so as to assure that elections are conducted in a constitutional manner. 'Elections cases require courts to be particularly careful to expedite disposition so that excessive procedural niceties do not result in delays making

the relief useless in an upcoming election.' Greenberg v. Bolger (1980) 497 F.Supp. 756, 772.

"Thus far in the processing of plaintiff's applications there appears to have been little thought given to the effect on the voting rights of the people of California of a refusal to transmit to Justice Rehnquist plaintiff's detailed evidence that the rules governing statewide redistricting cases 'have been practically nullified by a District Judge [and] by a concert of action on the part of several District Judges.' Los Angeles Brush Mfg. v. James (1927) 272 U.S. 701, 707 (cited in plaintiff's first application to Judge Rehnquist at [12 Record 19]). It is also important to bear in mind that the bedrock concept that ours is a government of laws, not of men entitles even a nonlawyer conducting his own case to expect that ex-

tensively documented charges of systematic obstruction of justice will be properly examined to determine whether they have validity. In his second application plaintiff complained (at [12 Record 32]) of the elevation of form over substance in the treatment of his first application:

> 'The rules of the Supreme Court presume that lower courts are making a good-faith effort to adjudicate the issues before them. When this presumption is being challenged, the Rules of the Supreme Court should not be applied in such a fashion as to make the challenge self-defeating.'

If satisfactory explanations are found for the conduct of these federal judges which plaintiff is challenging that finding will serve to ensure that not

even the appearance of widespread nullification of political rights does in fact exist; but '[T]o perform its high function in the best way "justice must satisfy the appearance of justice," Offutt v. United States, 348 U.S. 11, 14.' In re Murchison (1955) 349 U.S. 133, 136. Therefore there are no circumstances in which charges of this most sensitive nature should be carelessly dismissed.

"In response to the first such treatment of plaintiff's submission plaintiff noted that

> 'the Rules should not be rigidly applied so as to make it impossible for the Court to perform any function recognized as proper by the Court's opinions.
>
> "Rules of practice and procedure are devised to pro-

> mote the ends of justice, not to defeat them . . . . Orderly rules of procedure do not require sacrifice of the rules of fundamental justice." Hormel v. Helvering (1941) 312 U.S. 552, 557.'

A fuller citation of Hormel v. Helvering makes it clear that rejection of plaintiff's second application on grounds that a judgment by a lower court is essential before the Supreme Court can decide a controversy is contrary to the policy of the Court, which indeed allows issues raised for the first time in the Supreme Court to be decided there when an injustice would otherwise result. In Hormel the Court ruled:

> 'Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme con-

templates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence. . . . But [our] cases do not announce an inflexible practice, as indeed they could not without doing violence to statutes which give . . . the power to modify, reverse or remand decisions not in accordance

with law "as justice may require." There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below. See Blair v. Oesterlein Co. 275 U.S. 220, 225.

'Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically

urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.' Id. at 556-557.

"Thus the Rules of the Court recognize that situations may arise when normal appellate procedures must be subordinated to the interests of justice. Rule 18 allows the Supreme Court to decide a case before lower courts have completed action 'upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court.' Rule 24.2 allows the Court to expand the scope of an interlocutory review on a specific point of law 'if it appears that there is a special reason therefore [so that] this Court,

on application or on its own motion, may consider and decide the entire matter in controversy.'

"In plaintiff's first request [at 12 Record 18] that the Court take action 'on its own motion' he cited Connor v. Finch (1977) 431 U.S. 407, 421 n. 19 to the effect that, above and beyond its responsibility to decide controversies brought before it by parties to a lawsuit, the Supreme Court has 'the duty in exceptional circumstances to notice federal-court errors' and take corrective action 'when [these errors] seriously affect the fairness, integrity or public reputation of judicial proceedings.' In plaintiff's second application [at 12 Record 33] he protested the refusal of the clerk to transmit his prior application to Justice Rehnquist because this action deprived the Court of information which it needed

in order to determine whether to exercise 'the authority and the duty' which it had affirmed in Connor v. Finch supra.

"In his first application to Justice Rehnquist plaintiff cited [at 12 Record 23] Ex Parte Republic of Peru (1943) 318 U.S. 578, 585 n. 4: '[W]hatever the scope of the jurisdiction of this court, in no case does it decline to examine an application in order to determine whether it has jurisdiction.' A more complete citation of Ex Parte Republic of Peru supra makes it clear that applications seeking the issuance of writs to lower courts to provide relief from procedural violations are just the sort which court clerks should not deprive the Court of an opportunity to examine:

> '[T]he jurisdiction of this court to issue the common law

> writs to district courts . . . like its jurisdiction to grant certiorari is discretionary . . . . Whatever the scope of the jurisdiction of this court, in no case does it decline to examine an application in order to determine whether it has jurisdiction.'

"Even if Halliwell v. Eu should be adjudged not to pose issues requiring any departure from the Court's normal process of consideration, jurisdictional limitations do not preclude the Court from taking whatever action is needed to set a case on the proper jurisdictional track.

> 'Although without jurisdiction to hear the merits of the appeal this Court, in the exercise of its appellate jurisdiction has authority to give such direc-

> tions as may be appropriate to enforce the [requirements for three-judge courts] and to conform the procedure to its requirements. And we may frame our order in a way that will save to the appellants their proper remedies.' Oklahoma Gas & Electric Co. v. Oklahoma Packing Co. (1934) 292 U.S. 386, 392.

This is all that plaintiff is requesting at this time: that the Supreme Court direct the District Court to follow the correct procedures governing panels charged with cases of this kind."

866.29 Plaintiff, in summarizing "Damage to Public Confidence in the Integrity of the Judicial Process in California Arising from the Refusal of State and

Federal Courts to Adjudicate Redistricting Lawsuits" contends at 12 Record 209-215:

"The California Journal has noted that the architects of the districts used for California's 1982 elections 'resorted to old-fashioned hardball politics and rammed the shaft into the corpus Republicanus.' 3 Record 208-209. The adoption without determination of their constitutionality of such politically biased districts by the Democrat-dominated California Supreme Court and the refusal of Democrat-dominated federal district courts to adjudicate constitutional challenges to these districts has caused a loss of faith in the political even-handedness of both state and federal courts in California. This disillusionment has been reinforced by court decisions regarding the districts slated for use in 1984.

These are largely unchanged from the 1982 districts rejected by referendum, and those changes which have been made aggravate violations of the anti-gerrymandering standards for redistricting provided by Article XXI of the California Constitution.

"Furthermore, the Legislature's 1981 redistricting plans were also challenged by referendum and the 1983 plans by initiative, and both the referendum and the initiative were abrogated by decisions of the predominantly Democratic California Supreme Court. The referendum petitions were ruled valid by the California Supreme Court, and Article II §§ 9, 10 of the California Constitution precludes legislation blocked by referendum petition from going into effect unless and until approved by the voters; yet the California Supreme Court adopted the Legis-

lature's plans as court-ordered plans. The rationale for this action by the California Court was that a mere 5% of the electorate should not be allowed to thwart the will of the Legislature on redistricting and that California could not afford the $12 million necessary to hold a special election on this issue or postpone the primary until after the voters had voted on the referenda. The initiative was abrogated on equally indefensible grounds, the Republican on the Court vigorously dissenting.

"The replacement of scheduled elections in some districts with premature elections in districts more Democratic in voting tendency was the most controversial feature of the Legislature's 1981 senate redistricting plan. (See Appendix 1 [7 Record 281-284] for details.) This aspect of the

plan was strongly challenged as unconstitutional by Republican parties in Assembly v. Deukmejian (1982) 30 Cal. 3d 638 and by amici curiae. This gross denial of equality of representation could have been rectified simply by eliminating odd-even number switches in the numbering of districts of the Senate's plan, but the California Supreme Court adopted the Senate's redistricting plan without change as its own court-ordered plan. The Court's opinion in Assembly v. Deukmejian did not discuss the issue of disenfranchisement and double representation of Senate districts or any other aspect of the senate districts which it adopted.

"The redistricting plans adopted by the State Court in Assembly v. Deukmejian were challenged in three separate lawsuits in the Central, Eastern and

Northern District federal courts. The most clearcut issue in these lawsuits was the disenfranchisement and double representation of senate districts. In Chavez v. Eu (1982) (Central District of California 82-571 C.B.M.) the Court dismissed a claim that the disenfranchisement of senate districts violates the Fourteenth Amendment on the ground that 'the unconstitutional issues presented were previously argued before the California Supreme Court in the case of Assembly of the State of California v. Deukmejian, 30 Cal.3d 638 (1982).' Even if the issue of cancellation of elections in senate districts where incumbents' terms are expiring and holding them early in districts already represented by carry-over incumbents had been adjudicated in Assembly v. Deukmejian supra the plaintiffs in Chavez v. Eu,

not having been parties to Assembly, would not have been bound by the California court's disposition of that case.

> 'There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims.' England v. Louisiana Board of Medical Examiners (1964) 375 U.S. 411, 415-416.

"Another group of victims of senate district disenfranchisement based their action on the principle of 'No taxation without representation.' This

case, Richardson v. Eu (1982) (Northern District of California 82-1035 W.A.I.), was tied up for six months with a frivolous appeal by the Senate challenging the jurisdiction of a three-judge court over a statewide court-ordered redistricting plan. See Chapman v. Meier (1975) 420 U.S. 1, 13-14. When barely a month remained before the general election the Richardson plaintiffs were finally able to present their claims. The case was then dismissed on the ground that plaintiffs were free to challenge the action of the California Supreme Court in the lower California courts. A complete analysis of the unpublished opinion of the Richardson court is provided in Appendix 2, [11 Record 161-185] infra.

"Plaintiff's own lawsuit also includes a challenge to the disenfranchisement of some senate districts and the double representation of others

on the ground inter alia that this violates the principle of effective majority control of state legislative bodies. See Reynolds v. Sims (1964) 377 U.S. 533, 565. The court conducting Halliwell v. Eu has refused to decide this issue but has held it under advisement for more than a year to preclude plaintiff's appealing the court's refusal to even allow briefing on other aspects of the case. See [12 Record 89-97] of Appendix 4 of plaintiff's third application to Justice Rehnquist for details of how this jurisdictional blackmail has been used through earlier stages of the case.

"Even more destructive of public confidence than the defects in the contested districts was the process by which they were perpetuated for the 1984 elections. The defects in the districts used to conduct the 1982 elections led the voters of California to resoundingly

reject all three of the Legislature's redistricting plans in June 1982, and in November 1982 California elected a Republican governor. However, before the Governor-elect took office the lame-duck Democratic Governor called a special session on redistricting without an extraordinary occasion as required by Article IV § 3(b) of the California Constitution. At this illegal session redistricting legislation was enacted under a suspension of the rules without the 2/3 majority required by Article IV § 8(b) of the California Constitution. To protect its own districts from a further referendum challenge the Legislature adopted an urgency clause even though implementation at once of this new legislation was not necessary for immediate preservation of the public peace, health or safety as required by

Article IV § 8(d) of the California Constitution. A key role in the adoption of this urgency clause was played by the senators from the doubly represented districts.

"An initiative challenge to the illegal redistricting plans enacted by a rump Legislature at an illegal special session and signed by a lame-duck governor was qualified, and the new Governor called a special election for consideration of this initiative pursuant to Article II § 8(d) of the California Constitution.

"But even though Article II § 1 of the California Constitution provides that 'All political power is inherent in the people . . . and they have the right to alter or reform it when the public good may require' and Article I § 3 provides that 'The people have the right to instruct their representatives,'

the California Supreme Court ruled off the ballot the initiative challenge to the Legislature's new redistricting plans. To accomplish this the California Court conjured out of the air a limitation in Article XXI on the frequency of redistricting by the Legislature, ruled that this 'limitation' was binding on the electorate, refused to adjudicate a challenge to the constitutionality of the new redistricting plans, and invoked the presumptive validity of the challenged plans as grounds for not allowing a vote on the initiative in order to save $15 million in administrative costs.

"The Legislature's 1983 redistricting plans were also challenged in Eastern and Northern District federal courts on grounds of excessive population disparities and other constitutional defects; neither federal court

has adjudicated any aspect of these challenges. All of the challenged redistricting plans have a built-in bias in favor of Democratic candidates; all of the courts which refused to adjudicate the lawsuits challenging these plans are dominated by Democratic appointees.

"Had Justice Rehnquist been allowed to receive plaintiff's well-documented allegations of a flagrant disregard of established procedures in the Ninth Circuit's persistent refusal to exercise its lawful jurisdiction and had the Justice found no basis therein for intervention by the Supreme Court this decision would have assuaged, at least to some extent, the feeling in Republican circles that the rule of law with regard to political rights has been abrogated in California. But because no court has adjudicated any aspect of the

constitutional challenges to the contested districts Republican candidates and their supporters have been denied the solace that even an adverse decision on the merits of their lawsuits would have provided. On the other hand, if Justice Rehnquist had found plaintiff's evidence to be persuasive this would certainly have been a proper basis for a writ in aid of the Supreme Court's mandatory appellate jurisdiction under 28 U.S.C. § 2284.

"There must occasionally be exceptions to the principle that the rules by which our courts operate provide a remedy for every right, and normally the function of the Supreme Court is not to provide justice in individual cases but to establish interpretations of law to be applied by the lower courts. However, Congress has made a final decision on the merits

of constitutional challenges to statewide redistricting cases a part of the Supreme Court's mandatory jurisdiction. Where the jurisdiction of the Supreme Court is mandatory a litigant facing jurisdictional blackmail by the lower court if he files a normal appeal should not be prevented by law clerks from asking the Justice of the Circuit where this is taking place to suggest the appropriateness of corrective action in aid of this mandatory jurisdiction.

"When plaintiff made his first application to Justice Rehnquist on January 27, 1984 the process leading to the nomination and election of California's congressional and state legislative representatives had not yet commenced. Six weeks later this process is well underway, and further delay on account of refusal by law clerks to promptly transmit the accompanying ap-

plication to Justice Rehnquist as required by Rule 43.1 can only compound the miscarriage of justice already caused by delays in this case."

866.35 Plaintiff argued on March 20, 1984 at 12 Record 216-225:

"On January 27, 1984 and again on February 14, 1984 the plaintiff in Halliwell v. Eu submitted an application to Justice Rehnquist pursuant to Rule 43. The application in both instances requested that Justice Rehnquist recommend to the full Court appropriate steps to enforce the expedited consideration of constitutional challenges to statewide redistricting plans which is mandated by 28 U.S.C. § 2284. In his first application [at 12 Record 18] plaintiff explained that 'Plaintiff is precluded from making his own 28 U.S.C. § 1651(a) motion because when he tried to secure

intervention by the Ninth Circuit on this basis the [three-judge] panel cited that appeal as grounds for refusing to act at all.' In plaintiff's second application [at II Record 33] he stated,

> 'Although plaintiff's ability to appeal from the systematic obstruction [by the lower court] has been hamstrung by the District Court's policy of terminating consideration of any aspect of the case during any appeal, the Supreme Court has the authority to act sua sponte to break the procedural logjam which has developed in Halliwell v. Eu.'

In both of his prior applications plaintiff cited Connor v. Finch (1977) 431 U. S. 407, 421 n. 19 as authority for the Supreme Court to act sua sponte to cir-

cumvent the obstruction erected by the lower court against a normal appeal:

> '[T]his court has the authority and duty in exceptional circumstances to notice federal-court errors to which no exception has been taken, when they seriously affect the fairness, integrity or public reputation of judicial proceedings.'

"Although plaintiff did not file a petition pursuant to Rule 27 on account of the District Court's pattern of jurisdictional blackmail, he did provide the information required by that rule. Volume Eleven of the case appendix, which accompanied plaintiff's first application, included the texts of all orders of the lower court and the court of appeals as required by Rule 27.2. Also, in his application [at 12 Record 19-22] plaintiff reviewed the refusal of the

Ninth Circuit to expedite consideration when it had jurisdiction over Judge Karlton's actions as a single judge, thus demonstrating 'with particularity why relief is not available in any other court' as required by Rule 27.4.

"Plaintiff pointed out in his response to the first rejection letter that his application was in conformity with the requirements of Rule 43. Rule 43.2 states: 'Any motion or application addressed to an individual Justice shall be filed in the form prescribed by Rule 39, and shall be accompanied by proof of service on all parties.' Except for the change to letter-sized paper which plaintiff understands to have taken place in January 1983, both applications conformed to Rule 39. Both applications were also accompanied by proofs of service on all other parties, including service on the members of the lower

court as required by Rule 27.2(b) when a litigant is seeking the issuance of an extraordinary writ in aid of the Supreme Court's appellate jurisdiction.

"Plaintiff's first application to Justice Rehnquist was 'returned for failure to comply with the Rules of this Court to any substantial extent' without any reference to lack of compliance with any specific rule. This rejection appeared to be based on defects in the documents submitted, so plaintiff's second application included [at 12 Record 39-44] an analysis of how he had complied with the Rules to the extent possible under the circumstances.

"It appeared that the clerk did not realize that statewide redistricting cases are included in the Court's mandatory appellate jurisdiction and so rejected the first application for failure

to conform with the requirements (of Rule 20.3) for a petition for certiorari. Therefore plaintiff's second application [at 12 Record 34-36] also cited a Mississippi case (Connor v. Coleman 425 U.S. 675, 440 U.S. 612) wherein the Supreme Court's jurisdiction to issue writs to expedite consideration of a redistricting case before there is any lower court judgment to review is clearly affirmed.

"In addition to attaching this first rejection letter to his response to it clarifying the nature of his request, plaintiff also telephoned the deputy clerk who had rejected his application and secured an agreement that whatever defects might exist in his second application to Justice Rehnquist, this second submission would be retained by the clerk so that he would have it before him when plaintiff called to discuss steps needed to bring this submis-

sion into compliance with the Rules.

"However, another deputy clerk handled plaintiff's second application and apparently did not even consult with the first clerk. This deputy clerk neither retained the document to allow plaintiff to discuss steps needed to perfect it nor transmitted it to Justice Rehnquist; instead the second clerk rejected this second request on jurisdictional grounds while also citing 'failure to comply with the Rules of the Court' without referring to any particular rule. (See Appendix 3 [12 Record 229-232] to this memorandum for the first letter of rejection, plaintiff's response to that letter, and the second letter of rejection.) The refusal of a Court clerk to transmit a plaintiff's application to rectify a lower court's refusal to act -- on the ground that the lower court has not issued a reviewable

order -- is a gross misapplication of usual procedure and has serious consequences under the circumstances of this case, since the resulting waste of calendar time is critically important to the June elections in California.

"The letter rejecting plaintiff's second application to Justice Rehnquist notes: 'Under Article III of the Constitution, the jurisdiction of this court extends only to the consideration of cases or controversies properly brought before it from lower courts in accordance with federal law.' The opinions cited [at 12 Record 191-196] in Part I of this memorandum clearly demonstrate that the Court also has jurisdiction when cases are improperly prevented from being brought before it by lower courts in violation of federal law.

"In fact, Rule 9.1 recognizes that litigants may submit 'original applications for writs in aid of the Court's appellate jurisdiction' under Part VII of the Court's Rules. Although Part VII does not require it, original applications for writs in aid of the Court's appellate jurisdiction are often preceded by 'a motion for leave to file such pleading' such as Rule 9.3 makes mandatory for actions within the Court's original jurisdiction. If 'a writ of injunction may be granted by any Justice in a case where it might be granted by the Court' as provided by Rule 44.1, a single Justice should be able to grant permission for leave to file a petition seeking an injunction and most certainly has the authority to recommend the issuance of such a writ to the full Court; and since plain-

tiff's allegations of a widespread pattern of refusal to enforce federal statutes protecting voting rights involve judges of the Ninth Circuit, Justice Rehnquist's familiarity with the judges in his circuit makes it appropriate that he should make a recommendation to the full Court rather than that plaintiff should directly seek to call the situation in the Ninth Circuit to the attention of the Court.

"This rejection letter also notes: 'It does not appear that you have a judgment from any court which can be reviewed by this Court.' However, as the cases cited [at 12 Record 197-201] in Part II of this memorandum demonstrate, the Supreme Court may grant interlocutory review under the doctrine of pragmatic finality when protracted delays threaten irreversible damage to a litigant's rights. As plaintiff noted

at [12 Record 17] of his first application to Justice Rehnquist:

> 'Halliwell v. Eu involves federal constitutional challenges to California's state legislative and congressional schemes, and the case is under consideration by a three-judge panel convened pursuant to 28 U.S.C. § 2284. During the nearly two years since this case was filed on February 19, 1982 [immediately after the California Supreme Court refused to reconsider its adoption of the contested districts] the district court has adamantly refused to adjudicate any of plaintiff's claims on the merits, and despite plaintiff's utmost efforts to gain the expedited

consideration required by § 2284(b)(2), the case remains quagmired at the pleading stage.' If refusing to adjudicate a redistricting case for eight and a half months prior to the election of candidates from the contested districts followed by sixteen more months of stalling so that most of the term of office has expired of those elected in an allegedly unconstitutional manner does not constitute a final disposition it certainly comes close enough for the Supreme Court (to which an appeal comes directly under 28 U.S.C. § 1253) to consider the matter.

"The rejection letter responds to plaintiff's reference to the fact that the clerks of the Court transmitted an earlier application to expedite consideration to Justice Rehnquist by noting: 'The application for injunction that you filed in October 1982 was seeking review

of an order of the U.S. District Court for the Eastern District of California.' What plaintiff actually appealed on October 27, 1982 was the refusal of the lower court to adjudicate the constitutionality of the contested districts prior to the November 2, 1982 General Election. Obviously sixteen months of continued refusal to adjudicate the constitutionality of these same districts (and the use of essentially unchanged districts for the 1984 elections) strengthens the case for expedited consideration, so even though Justice Rehnquist denied plaintiff's October 1982 application for expedited consideration he might well grant plaintiff some sort of relief in the present circumstances.

"The rejection letter also notes: 'The Justices of this Court cannot give advice or assistance on the

basis of correspondence.' The Justices certainly may give reasons for their rejection of any petition which constitute advice to a litigant on how to proceed. While the Court will not give advisory opinions on substantive legal questions the Court's opinions make a great effort to mark out proper jurisdictional pathways, and Wright & Miller's Federal Practice and Procedures observes that the precedents governing direct appeals from three-judge courts are so difficult to apply that very few experienced lawyers are able to cope with them. In such circumstances the recognition by the Court in Haines v. Kerner (1972) 404 U.S. 519, 521 that pro se litigants are held to less stringent standards than lawyers would seem to provide a basis for granting plaintiff the modest procedural clarification which he requested (see [12 Record 38] of plaintiff's

second application) even if he is entitled to no other relief.

"Furthermore, as Oklahoma Gas & Electric Co. v. Oklahoma Packing Co. [292 U.S. at 392] affirms, even when the Supreme Court lacks jurisdiction it may give such directions to other courts as are necessary to preserve a would-be appellant's proper remedies. If such instructions may be given to a court surely they may be given to a litigant protesting obstruction by a lower federal court.

"Moreover, [12 Record 202-208] of this memorandum also cites precedents which affirm that the Supreme Court may decide issues not raised in a lower court, and this doctrine certainly allows the Supreme Court to decide issues which a plaintiff has tried to raise in a lower court and is being prevented from ap-

pealing by jurisdictional blackmail -- and are thoroughly documented in the case record.

"The case record itself is of central importance to plaintiff's submission. In his first application plaintiff suggested the desirability of issuance of a writ of mandamus under 28 U.S.C. § 1651(a) and [at 12 Record 19] cited Los Angeles Brush Mfg. v. James (1927) 272 U.S. 701, 707 as support for 'the appropriateness of a writ of mandamus when a lower court refuses to adjudicate a case according to established procedures,' so he submitted along with his first application a copy of the whole case record, as allowed by Rule 27.4. Rule 27.2 places no limitation on a petitioner's right to file 'such other papers as may be essential to an understanding of the petitions,' and this case appendix is indeed 'essen-

tial to an understanding of' plaintiff's application, since arguments raised in the lower court and evidence presented there are incorporated by reference to case appendix volume and page numbers.

"Moreover, if plaintiff's contention that the lower court has engaged in a series of stalling maneuvers and done virtually nothing to adjudicate the case for the past two years is to be properly evaluated, Justice Rehnquist must have access to the whole record, not simply to those portions selected by plaintiff. Furthermore, Justice Rehnquist, in the interests of conserving calendar time, may wish to consider arguments filed in lower-court proceedings which the parties and the lower court have had an opportunity to address rather than delaying his recommendation on interlocutory intervention until the parties have had an oppor-

tunity to respond to issues raised in a petition to the Supreme Court.

"Nevertheless, when plaintiff's first submission was rejected the case appendix used in the lower court (including the entire case record bound in 11 volumes and paginated by volume) also was shipped back to plaintiff. The reason given for the rejection of the case appendix was that the case record is normally supplied by the lower court. This could hardly be less appropriate than when the lower court is being accused of obstruction of justice by deliberate stalling tactics, since prompt cooperation by a court accused of deliberate stalling tactics cannot fairly be made a necessary element in evaluating such charges.

"Even if the District Court were to supply the case record while it continues the stalling and obstruc-

tion which plaintiff's application to the High Court seeks to end, it would either certify one of its own copies of the case appendix, in which case the copy at hand would serve as well and could be used without the delay produced by securing another copy, or it would certify the original documents filed in the case -- a task which would interfere with the lower court's adjudication. Moreover, such an original compilation by the lower court would lack the pagination of the case appendix, which has been used extensively in briefs to avoid duplication of arguments previously made.

"The rejection of the case appendix is inappropriate even if Justice Rehnquist does not wish to have this document available for inspection, since plaintiff noted (at [12 Record 23] of his first submission) that this document

would soon be used in support of a follow-up petition. The delay and expense to plaintiff resulting from shipping the case appendix back and forth is a violation of the principle set forth in James, [272 U.S. at 707]:

> 'One of the causes for complaint of the general administration of justice is the expense it entails upon the litigants, and, so far as it reasonably may do so, this Court is anxious to minimize the basis for such complaints.'

"Surely the modest burden of retaining this case record until the issue of injunctive relief relating to the 1984 elections is decided is not excessive in view of the special circumstances of this case. Plaintiff therefore requests permission to return to the Court the eleven volumes of case

appendix, which are essential to the evaluation of the appropriateness of interlocutory intervention in this statewide redistricting case filed on February 19, 1982 and not yet adjudicated by the lower court more than two years and one full elections cycle later."

866.41 Plaintiff concludes his March 20, 1984 "Memorandum Regarding Refusal of Court Clerks to Transmit Plaintiff's Applications to Justice Rehnquist Pursuant to Rule 43" at 12 Record 226-227:

"Part III of this memorandum cites Ex Parte Peru (also cited at [12 Record 23] of plaintiff's first application), which demonstrates the inappropriateness of circumscribing the Court's discretionary jurisdiction to issue

writs to lower courts by denying to the Court an opportunity to examine an application to determine whether it has jurisdiction. Part IV discusses [at 12 Record 209-215] the damage done to the political rights of the citizens of California and to confidence in the fairness of the judiciary that already has occurred because because of the total refusal of the California Supreme Court and the courts of the Ninth Circuit to adjudicate constitutional challenges to the districts used for California's 1982 congressional and state legislative elections and those slated for use in 1984 elections. This damage has now been aggravated by two Court clerks who have not allowed the Supreme Court to exercise its responsibility to preserve the integrity and public reputation of the federal court system. In view of the ongoing

elections process in California 'it is too late in the day and entirely contrary to the spirit of the Federal Rules' for Court clerks to take further action which prevents plaintiff's applications to Justice Rehnquist from being promptly transmitted to the Justice and thereby causes '[a] decision on the merits to be avoided on the basis of mere technicalities.' See Foman v. Davis (1963) 371 U.S. 178, 181-182.

"In the present circumstances plaintiff believes he is entitled to have this third application to Justice Rehnquist, along with his two prior applications enclosed herewith and the case record, transmitted to the Justice without delay. Rule 43 does not place any limitation on the subject matter of an application to an individual Justice, and Rule 43.1 provides: 'Any motion or

application addressed to an individual Justice shall normally be submitted to the clerk, who will promptly transmit it to the Justice concerned.' (Emphasis added.)

"If in spite of the unusual legal aspects of this submission and of this case the Clerk of the Court agrees with the two deputy clerks that plaintiff's applications to Justice Rehnquist are not suitable for transmission to the Justice plaintiff will do his best to satisfy the objections of the Clerk. Plaintiff requests that in any event these applications not be returned to him until he has had an opportunity to discuss any defects therein with a deputy clerk."

866.47 Plaintiff argued in his April 7, 1984 "Motion Regarding Transmission of an Application to

Justice Rehnquist" at 12 Record 290-293:

"This motion comes before the Court under Rule 42 because of the refusal of deputy clerks to transmit to Justice Rehnquist, as required by Rule 43.1, applications fully complying with Rule 43.2.

"On January 27, 1984 plaintiff's application requested that Justice Rehnquist recommend to the full Court appropriate steps to enforce the expedited consideration of constitutional challenges to statewide redistricting plans which is mandated by 28 U.S.C. § 2284. This application explained why it would be self-defeating for plaintiff to petition in the normal manner for a writ of mandamus: 'Plaintiff is precluded from making his own 28 U.S.C. § 1651(a) motion because when he tried to secure intervention by the

Ninth Circuit on this basis the [three-judge] panel cited that appeal as grounds for refusing to act at all.'

"This application was returned 'for failure to comply with the Rules of this Court to any substantial extent,' without mention of any rule violation.

"Plaintiff's application of February 14, 1984 noted:

> 'Since plaintiff made his request that Justice Rehnquist decide whether to recommend that the Court consider a writ to expedite proceedings, the District Court has denied plaintiff's request for a status conference to get the case back on track. (A copy of the order [12 Record 46-47] is attached following the Appendix.) The District Court's justification for this latest refusal to act is that it has

yet to decide on motions filed on January 7, 1983 and argued on February 16, 1983.'

The application cited Connor v. Coleman (1976) 425 U.S. 675 and (1979) 440 U.S. 612 in support of mandamus to expedite consideration of a redistricting case. The application included an appendix [12 Record 39-44] demonstrating compliance with Rules 10, 13, 15, 26 and 27 to the extent that circumstances permitted and full compliance with Rules 39 and 43. This application was rejected on account of 'failure to comply with the Rules of the Court,' again without mentioning any specific Rules violation. The rejection letter noted: 'Under Article III of the Constitution, the jurisdiction of this Court extends only to the consideration of cases or controversies properly brought it from lower courts in accordance with federal

law.'

"In response plaintiff's application of March 20, 1984 was accompanied by a memorandum which cited Baltimore Contractors Inc. v. Bodinger (1955) 348 U.S. 176, 181-182, 'It is the responsibility of all courts to see that no unauthorized extension or reduction of jurisdiction, direct or indirect, occurs in the federal system'; noted the language of 28 U.S.C. § 2284(b)(2) which requires that a hearing on a statewide redistricting case be held on 'the earliest practicable day'; and argued that 'the Court also has jurisdiction when cases are improperly prevented from being brought before it by lower courts in violation of federal law.'

"Plaintiff also cited Rule 44.1, which provides that 'a writ of injunction may be granted by any Justice in a case where it might be granted by the

Court,' and noted that 'since plaintiff's allegations of a widespread pattern of refusal to enforce federal statutes protecting voting rights involve judges of the Ninth Circuit, Justice Rehnquist's familiarity with the judges in his circuit makes it appropriate that he should make a recommendation to the full Court rather than that plaintiff should directly seek to call the situation in the Ninth Circuit to the attention of the Court.'

"When plaintiff called the Clerk's office to discuss this application Ms. Katherine Downs informed him that she did not consider a writ of mandamus to be an injunction and so had rejected plaintiff's application as inappropriate for the consideration of a single Justice.

"If the Court determines that an application to an individual Justice may

not ordinarily address the issue of mandamus, plaintiff requests that an exception be made in Halliwell v. Eu due to the following circumstances:

1) In spite of plaintiff's strenuous protests because the California Senate and Assembly have refused to provide essential population data under their exclusive control, the District Court has cited plaintiff's failure to provide evidence dependent upon these data as grounds for its dismissal with prejudice of his senate claims and for granting a summary judgment to the Assembly. Plaintiff's application to Justice Rehnquist will suggest the appropriateness of mandamus to the District Court to secure an adequate factual record.

2) After two years of refusing to require defendants to respond to plaintiff's

congressional claims the District Court has at last ordered briefing on this subject. Since the District Court has previously suspended proceedings on unrelated aspects of the case during an appeal until plaintiff relinquished his attempts to appeal, plaintiff will suggest the appropriateness of mandamus to prevent the lower court from suspending proceedings on the congressional claims because plaintiff is appealing the District Court's action regarding his senate and assembly claims.

3) After two years of refusing to consider the issue of disenfranchisement of some legislative districts so that others might enjoy double representation the District Corut has ruled that it is now so late that any injunctive relief would be unduly disruptive.

Plaintiff will appeal the District Court's refusal to rectify this problem. The long delays by the District Court in its consideration of this issue are closely related to plaintiff's requests for mandamus and so should be addressed in the same application.

"Therefore plaintiff requests leave to have promptly transmitted to Justice Rehnquist an application addressing the above issues along with briefs of the parties and orders of the Court 'essential to an understanding of the application.'"

866.53 Plaintiff argued in his April 20, 1984 letter to Clerk Alexander L. Stevas of the U.S. Supreme Court at 12 Record 397-399:

"None of the documents rejected by as-

sistant clerks failed to comply with applicable format requirements (of Rule 42 regarding motions to the Court in the case of the latest submission or of Rule 43 regarding motions and applications to individual Justices in the case of the first three submissions). All four submissions were accompanied by proof of service on all parties and members of the lower court.

"Even a cursory inspection of my submission of April 7, 1984 reveals that it is not any sort of application for a stay or injunction, but a motion to the Court to ensure that an application to an individual Justice to be submitted later will be promptly transmitted to the Justice concerned. Since plaintiff submitted 40 copies of this motion and it was shorter than 5 pages and it did not fall within any of the categories where Rule 33 is applicable

there seems to be no basis for its rejection.

"None of the three previous applications rejected for unspecified violations of Court Rules or because they did not comply with Rule 27.1 were in fact petitions for a writ of mandamus. These applications to Justice Rehnquist were motions seeking his recommendation to the full Court regarding the appropriateness of mandamus. In my telephone conversation with Ms. Downs she contended that one could not submit a motion to a single Justice; but this position is flatly contradicted by the title of Rule 43. Moreover, Rule 44.1 would allow Justice Rehnquist to issue a writ of mandamus on his own authority should he decide that the ongoing elections process in California requires that consideration by the lower court be expedited immediately.

"The usual practice regarding mandamus is not to issue the writ but simply to define the judicial duties involved, providing leave to the aggrieved party to seek issuance of the writ in the event that these duties are not promptly performed. See Nixon v. Richey (1975) 513 F.2d 430, 435. A plaintiff in a statewide redistricting case certainly should be allowed to have his request for affirmation of his right to expedited consideration promptly transmitted to his circuit Justice when the lower court has delayed adjudication for more than two years. (28 U.S.C. § 2284(b)(2), which governs statewide reapportionment cases, requires that 'The hearing shall be given precedence and held on the earliest practicable day.')

"While a Court clerk may properly insist that the format and proof of

service requirements of Rule 43.2 be complied with before forwarding an application to an individual Justice, Rule 43.1 seems to preclude any subject-matter screening: 'Any motion or application addressed to an individual Justice shall normally be submitted to the Clerk, who will promptly transmit it to the Justice concerned.' Rule 43.6 allows an individual Justice to refer applications to the whole Court, but there is no provision allowing a Court clerk to do so.

"The only reference to a jurisdictional screening by clerks anywhere in the Rules of the Supreme Court is Rule 46.3 relating to proceedings in forma pauperis. With regard to discretionary writs such as mandamus, jurisdictional decisions have been explicitly reserved by the Court to itself:

'[W]hatever the scope of the

> jurisdiction of this court, in no case does it decline to examine an application in order to determine whether it has jurisdiction.' Ex Parte Republic of Peru (1943) 318 U.S. 578, 585 n. 4.

"Yet Ms. Downs has insisted upon determining whether plaintiff's applications come within the Court's jurisdiction. She has done a poor job of this because (1) she apparently did not realize that a court's refusal to act may, under the doctrine of pragmatic finality, be an acceptable substitute for a final judgment and thus provide the basis for an appeal under 28 U.S.C. § 1291. (2) She failed to consider the manifest injustice of requiring a litigant protesting a lower court's inaction to produce an appealable order. 'Orderly rules of procedure do not require

sacrifice of the rules of fundamental justice.' Hormel v. Helvering (1941) 312 U.S. 552, 557. (3) She refused plaintiff's written and oral requests that she retain a copy of any application she refused to transmit so plaintiff could discuss it while she had the document before her.

"Overly hasty disposition of submissions also seems to have been a factor. Plaintiff submitted a copy of an order from the Ninth Circuit stating:

> 'If appellant believes that review of this court's actions is necessary, his remedy lies in an application to the United States Supreme Court. Further attempts to obtain reconsideration by this court may result in the imposition of sanctions.'

Plaintiff's application made it clear

that this order was provided as evidence that he had exhausted his lower-court remedies. However, after Ms. Downs rejected this application she then rejected plaintiff's next application on the grounds that an appeal from the judgment of the Ninth Circuit would be jurisdictionally out of time. When plaintiff's next submission pointed out that he wished to seek relief from the District Court's continued inaction, not the earlier refusal of the Ninth Circuit to expedite (the single-judge phase of) proceedings, Ms. Downs invoked failure to exhaust lower-court remedies as grounds for her rejection.

"What plaintiff urgently seeks at this point is a definitive statement by the Office of the Clerk on the following points:

1) What sort of motions may <u>not</u> be submitted to an individual Justice?

2) Is a writ of mandamus a writ of injunction within the meaning of Rule 44.1?

3) Under what circumstances does an assistant clerk have the authority to refuse to transmit a motion complying with Rule 42 to the full Court?

"During the time while plaintiff's January 27, 1984 and subsequent applications to Justice Rehnquist have been rejected, the ongoing California elections process has made calendar time a factor of critical importance; so your prompt assistance will be greatly appreciated."

866.59 Plaintiff argued in his April 27, 1984 letter to Clerk Alexander L. Stevas of the U.S. Supreme Court at 12 Record 438-439:

"As per our arrangement by telephone on April 17, I have contacted your Chief Deputy, Mr. Francis J. Lorson, concerning my complaints regarding the treatment given my submissions to the Court by Assistant Clerk Katherine Downs. I talked to Mr. Lorson on April 26, 1984, and he ruled as follows on the three questions asked by my letter of April 20, 1984:

Question 1: 'What sort of motions may not be submitted to an individual Justice?'

Answer: Only applications may be submitted to an individual Justice; all motions must be submitted to the full Court.

Question 2: 'Is a writ of mandamus a writ of injunction within the meaning of Rule 44.1?'

Answer: An extraordinary writ is not a writ of injunction.

Question 3: 'Under what circumstances does an assistant clerk have the authority to refuse to transmit a motion complying with Rule 42 to the full Court?'

Answer: A litigant must demonstrate exhaustion of lower-court remedies before the clerk will transmit any motion to the Court.

"Mr. Lorson stated that if I were not satisfied with his disposition of these questions I should appeal to his superior, the Clerk of the Court. Since I believe that the above rulings are contrary to both the intent and the literal meaning of the Rules of the Court and since actions of deputy clerks contrary to the plain terms of the Rules

of the Court have had a devastating impact upon my ability to secure timely consideration of my case, I am making that appeal to you in the enclosed memorandum.

"In the first portion of this appeal [12 Record 443-450] I note basic definitions and provisions of the Rules which contradict Mr. Lorson's interpretations. In the second portion of the appeal [12 Record 451-452] I discuss some of the unusual circumstances of my case which make it essential that I be allowed to invoke particular Rules in thier literal meanings as I have been seeking to do since January 27 of this year.

"Section III of this memorandum [12 Record 453-454] attempts to forestall the sort of mishandling which my previous recent motions have suffered by explaining to you personally the basic

procedural reasons why the special new motion accompanying this appeal is necessary and must be transmitted for the most prompt consideration possible if this case is not to be suspended in jurisdictional limbo because no one wants to touch the issues it raises."

866.65 Plaintiff, in his April 27, 1984 Appeal to the Chief Clerk of the U.S. Supreme Court, summarizes "Allowability of Motions to Individual Justices" at 12 Record 443-444:

"The title of Rule 43 is: MOTIONS AND APPLICATIONS TO INDIVIDUAL JUSTICES. Rule 43.1 provides: 'Any motion or application addressed to an individual Justice shall normally be submitted to the clerk, who will promptly transmit it to the Justice concerned.'

Rule 43.2 provides: 'Any motion or application addressed to an individual Justice shall be filed in the form prescribed by rule 39 . . . .'

Rule 43.3 provides: 'The clerk in due course will advise all counsel concerned . . . of the disposition made of the motion or application.'

Rule 43.4 provides: 'The motion or application will be addressed to the Justice alloted to the circuit within which the case arises.'

Rule 43.5 provides: 'A Justice denying a motion or application made to him will note his denial thereon. . . . the party making the motion or application . . . may renew it to any other Justice . . . any such renewed

motion or application is not favored.'

Rule 43.6 provides: 'Any Justice to whom a motion or application for a stay or bail is submitted may refer it to the court for determination.'

"Rule 42.1 governing motions to the Court notes: 'For an application or motion addressed to a single Justice, see Rule 43.' If your office engages in abrogation of these ten provisions of the Rules of Court which authorize motions to an individual Justice you should promptly revise your policies.

"In my conversation with Mr. Lorson he said with great feeling, 'Do you realize what would happen if we wasted the time of the Justices with motions like yours? We would be fired, do you understand me? Fired!' If clerks may actually be fired for wasting

the Justices' time by forwarding motions as provided by Rules 43.1 and 43.2 clerks will inevitably err on the side of exclusion, since that will ensure that the Justices never see the meritorious motions that the clerks have wrongfully excluded. A harsh employment policy of the sort implied by Mr. Lorson would vitiate the liberal spirit of the Federal Rules of Civil Procedure which govern the operations of the Court."

866.71 Plaintiff in his April 27, 1984 appeal to the Chief Clerk of the U.S. Supreme Court summarizes "Applicability of Rule 44.1 to Writs of Mandamus" at 12 Record 444-448:

"The plain terms of Rule 44.1, 'a writ of injunction may be granted by a Justice in a case where it might be granted by the Court,' do not make an exception

for mandatory injunctions. It is true that all courts are more reluctant to issue mandatory injunctions than prohibitory injunctions and that the few writs of mandamus that are actually issued by the Supreme Court these days are all approved by a majority of the Justices. Nevertheless, Rule 44.1 has not been changed since the era of massive resistance to the Court's school desegregation decision, and during that period in several circuits individual Justices were obliged to ride herd on recalcitrant segregationist judges because they had to be coerced into obeying the law.

"Likewise in suggesting the appropriateness of a single-Justice writ of mandamus plaintiff provided evidence of massive resistance to the enforcement of federal protection for political rights. Plaintiff's submission of

January 27, 1984 was accompanied by a complete case record with a notation calling attention to Volume 11, where an analysis of the history of the case commenced:

> 'In this review of the treatment by the Ninth Circuit of federal-court challenges to the redistricting plans mandated by Assembly v. Deukmejian the complete texts of all orders by Judge Karlton and by the full panel in Halliwell v. Eu (Eastern Dist. Cal. 82-147-LKK) are included, and also the entirety of the rulings by Judges Hug and Wright in appeals from these orders (9th Cir. 82-4453). Also included are the full texts of dismissal orders in Chavez v. Eu (Central Dist. Cal. 82-571-CBM) and Richardson v. Eu

(Northern Dist. Cal. 82-1035-WAI), which were filed by defendants in their efforts to invoke comity among federal courts as grounds for dismissal of Halliwell v. Eu.' 11 Record 1.

The analysis concluded:

'[A] litigant's responsibility in circumstances where due process of law has collapsed at the district court and circuit court levels is simply to compile appropriate documentation of the facts and provide this record to the United States Supreme Court. As the High Court notes in Connor v. Finch (1977) 431 U.S. 407, 421 n. 19:

"[T]his Court has the authority and the duty in ex-

> ceptional circumstances to notice federal-court errors to which no exception has been taken, when they 'seriously affect the fairness, integrity or public reputation of judicial proceedings.' [Citations]."'

11 Record 359.

"However, the letter rejecting this submission noted:

> 'I am also returning under separate cover, the two boxes of materials that you sent. A record is transmitted to this court only after a case has been filed here, and is transmitted by the lower court at the request of the Court.'

However appropriate such a policy may be in ordinary circumstances, one cannot expect more than grudging co-operation

from a lower court when that court has continued its two-year-long defiance of the expedited consideration requirement for constitutional challenges to state-wide redistricting plans (mandated by 28 U.S.C. § 2284(b)(2)) in the face of this warning given by plaintiff 3 1/2 months ago:

> 'No conceivable definition of "good behavior" can encompass collusion in a massive coverup of judicial misconduct, whether the participation is active or simply dereliction of duty; and it makes no difference whether a judge is motivated by sympathy with the purposes of a conspiracy to abrogate political rights or simply by judicial in-group solidarity. It is simply not permissible to wish the good behavior requirement contained

in Article III § 1 out of existence, pretending that the proper standard for judicial conduct is abstention from commission of high crimes and misdemeanors which would require impeachment. [Continued in footnote: Moreover, impeachment would obviously be inappropriate in this case because any impeachment resolution directed against federal judges who have participated in the coverup of the flagrant abrogation of federally protected voting rights by the California Supreme Court in Assembly v. Deukmejian and subsequent litigation would have to be considered by a House of Representatives which includes six California congressmen who owe their

> seats to the blatantly gerrymandered districts imposed by Assembly v. Deukmejian.] The good behavior requirement stands apart; and as noted in Marbury v. Madison [5 U.S. at 174] every phase of the Constitution is significant.' 11 Record 354.

"When plaintiff petitioned Justice Rehnquist in October of 1982 for relief from the inaction of the three-judge panel conducting his case Mr. Lorson recognized that inexcusable inaction could be proven only by an examination of the entire case record and therefore allowed plaintiff to provide this record since these documents constituted 'such other papers as may be essential to an understanding of the petition.' When in our conversation yesterday Mr. Lorson denounced plain-

tiff for providing bare pleadings without relevant lower-court orders plaintiff pointed out that these materials had been rejected by deputy clerks. Mr. Lorson's rejoinder was that 'We can't be expected to keep a file for all two hundred million people in the United States.' While this is undeniably true, a case within the mandatory jurisdiction of the Supreme Court in which irrevocable damage already has occurred to the political rights of twenty-five million Californians is certainly important enough for clerks to retain supporting documents long enough for a single Justice to consider a motion to halt further damage to these rights."

866.77 Plaintiff in his April 27, 1984 appeal to the Chief Clerk of the U.S. Supreme Court summarizes "Refusal of Supreme

Court Clerks to Adhere to the Rules of the Court" at 12 Record 448-450:

"It is true that nearly all motions to the Court involve cases in which appellant has demonstrated exhaustion of lower-court remedies, but this general tendency does not provide a basis for rejection of a motion when a petitioner has previously demonstrated exhaustion of lower-court remedies and this demonstration has been intercepted by law clerks and the motion simply seeks to make arrangements to assure that this demonstration will not be rejected again when it is resubmitted. Ms. Downs was informed by plaintiff that he had an unambiguously appealable order (denying injunctive relief regarding the cancellation of state senate elections in some districts and holding elections two years

early in other districts) from the three-judge panel conducting his case, and Ms. Downs confirmed that the appeal from this order should go to Justice Rehnquist. All the motion to the full Court [12 Record 290-293] which Ms. Downs rejected would have done is allow plaintiff to discuss related aspects of the case in the same application. The terms of the motion made it absolutely clear that the application which plaintiff wished to submit would be accompanied by the court order which provided the basis for Supreme Court jurisdiction. The motion concluded:

> 'Therefore plaintiff requests leave to have promptly transmitted to Justice Rehnquist an application addressing the above issues along with briefs of the parties and orders of the

court "essential to an understanding of the application."'

"There is absolutely no basis for rejecting a motion of this sort submitted under and complying with Rule 42 'for failure to comply with Rule 44.4.' Rule 44.4 applies to an application for a stay or injunction to a Justice of this Court, not to a motion seeking permission to include related matters in an application to be submitted later to an individual Justice.

"In any event, the delays incurred since January 27, 1984 on account of repeated violations of Court Rules by deputy clerks certainly comes close enough to 'the most extraordinary circumstances' which allow an exception to Rule 44.4 for the Court to consider the matter.

"One of the aspects of the case which a litigant seeking potentially

disruptive intervention in the elections process must address is why application was not made earlier, when this disruption could have been avoided. Since the months following January 27, 1984 are crucial in this respect, plaintiff included as part of his application of March 20, 1984 a detailed analysis of the conduct of Ms. Downs and Mr. Vasil in a document entitled, 'Memorandum Regarding Refusal of Court Clerks to Transmit Plaintiff's Application to Justice Rehnquist Pursuant to Rule 43.' [12 Record 183-233.] Plaintiff was concerned that Ms. Downs would again intercept any application containing this same information and therefore filed a preliminary motion to make certain that his next application would be promptly transmitted to Justice Rehnquist as Rule 43.1 requires. This preliminary motion, for which 40 copies

were provided, could not have been mistaken for an application to an individual Justice; therefore Rule 44.4 did not apply at all, and when Ms. Downs refused to forward these copies she was engaging in a coverup of her own previous unjustified rejections of plaintiff's applications."

866.83 Plaintiff, in his April 27, 1984 appeal to the Chief Clerk of the U.S. Supreme Court, summarizes "Circumstances Requiring that Plaintiff Prosecute His Appeal Under the Rules He Has Invoked" at 12 Record 451-452: "The clerks have overlooked the reasons for plaintiff's use of a motion seeking a recommendation of mandamus by his circuit justice instead of a petition to the Full Court seeking mandamus.

"In McCain v. Lybrand (1984) 79

L.Ed. 2d 271, 278 the Court discusses the need perceived by Congress for close supervision of cases involving voting rights in jurisdictions where the political rights of minorities have been systematically violated. Plaintiff in Halliwell v. Eu has provided detailed evidence, totally unrebutted by defendants, that California has become such a jurisdiction with regard to the political rights of Republicans. It will be very difficult to persuade a single Justice to invest the time required to provide the close supervision of the process of adjudication of plaintiff's claims to the point where the severe damage inflicted on California's institutions of representative democracy is rectified. It would be impossible to secure this sort of detailed consideration from the full Court in view of the overwhelming demands on the

Court's time.

"Plaintiff has left the scope of the investigation of his allegations entirely up to Justice Rehnquist, asking only that the case record be provided to him so that he can determine what action is appropriate in the circumstances. For court clerks to have prevented consideration of such a modest proposal in a case of such potential magnitude is indefensible. Justice Rehnquist is perfectly capable of referring any or all aspects of plaintiff's allegations to the full Court and of specifying the format which will best facilitate the consideration of this matter. Court clerks should promptly desist from the usurpation of Justice Rehnquist's authority and allow the Justice to exercise this authority in the manner prescribed by Rule 43.

"The alternative course of action which the deputy clerks prefer that

plaintiff pursue is quite inapplicable to the circumstances of this case and would be very counterproductive; for plaintiff's interest is in securing compliance with the law by the lower court, not in securing issuance of a writ compelling compliance with some aspect of applicable procedure only to have the obstructionist tactics of the lower court take yet another form. Plaintiff has felt obliged to file charges and specifications [12 Record 409-428] with the Ninth Circuit regarding the obstructionist tactics of the three-judge panel conducting his case and the two-judge screening panel of the Ninth Circuit which aborted his appeals seeking enforcement of applicable procedural requirements, and judges guilty of deliberate misconduct can hardly be expected to meekly desist from further obstructionist tactics so

as to allow a compilation of a proper record which fully reflects the nature of the constitutional grievances which the court has refused to adjudicate and of the strategems employed by the court to thwart adjudication. While all federal judges must be presumed innocent of deliberate obstruction of justice until proven otherwise, a litigant seeking to prove deliberate sabotage of his case due to partisan interests and judicial in-group solidarity cannot justly be required to employ a procedure which will be ineffective in protecting his rights if these charges are true."

866.89 Plaintiff argued in his May 19, 1984 Motion #3 to Justice Rehnquist at 13 Record 75-83: "A principal factor in the refusal of clerks of the U.S. Supreme Court to

transmit plaintiff-appellant's motions of January 27, February 14, March 20 and April 7, 1984 has been an insistence that an individual Justice has no authority to issue an extraordinary writ pursuant to 28 U.S.C. § 1651(a). As authority for this position the clerks have relied upon Rule 27.1:

> 'The petition in any proceeding seeking the issuance by this Court of a writ authorized by 28 U.S.C. § 1651 (a), 2241, or 2254(a), shall comply in all respects with Rule 33, except that a party proceeding in forma pauperis may proceed in the manner provided in Rule 46.' Emphasis added.

"In defense of his right to seek a mandatory writ from his Circuit Justice plaintiff has relied upon Rule

44.1:

> 'A stay may be granted by a Justice of this Court as permitted by law; and a writ of injunction may be granted by any Justice in a case where it might be granted by the Court.' Emphasis added.

"Even if plaintiff were mistaken about the Court's policy regarding mandatory injunctions the adamant refusal of Court clerks to transmit his motions as required by Rule 43.1 could not be justified in light of its devastating impact on the time-bound political rights involved in the case and the less stringent standards applicable to submissions to the Court by nonlawyers mandated by Haines v. Kerner (1972) 404 U.S. 519, 520-521.

"The nearest thing to support for the clerks' position which plain-

tiff's extensive research on this subject has turned up is a statement by Jerald J. Director in 'Considerations Affecting Grant or Vacation of Stay or Injunction by Individual Justice of Supreme Court' (1970) 24 L.Ed.2d 925, 931:

> 'While not professing to limit their power to grant stays or injunctions, the individual justices have sometimes expressed self-imposed restraints on their exercise of that power in certain special circumstances . . . .'

However, not one of the cases cited by Director's comprehensive review or any opinion in chambers published since 1970 supports the notion that there is a category of injunctions that may be issued only by the full Court.

"On the other hand there are numerous Circuit Justice opinions which squarely support plaintiff's position. In Coleman v. Paccar (1976) 424 U.S. 1301 Justice Rehnquist granted an application for a writ in aid of the Supreme Court's jurisdiction when the lower court had not finally disposed of the case or even scheduled oral argument on the merits. Justice Rehnquist noted: 'Pursuant to Rules 50 and 51 [now Rules 43 and 44] of this Court I have authority as Circuit Justice to take any action which the full Court might take under 28 U.S.C. § 1651.' Id. at 1302. Also, in the course of issuing an extraordinary writ in Leonard v. Wolff (1979) 443 U.S. 1306, 1306-1307 Justice Rehnquist noted that he had done so '[i]n the exercise of what I find to be as difficult a task as must be performed by

any member of this court -- the obligation to act as surrogate for the entire court in deciding to grant or deny extraordinary relief pursuant to 28 U.S.C. § 1651 . . . .' In Atiyeh v. Capps (1981) 449 U.S. 1312, 1313 Justice Rehnquist (in chambers) ruled:

> 'I am satisfied in my own mind that, although it should not be nearly as frequently done as in the case of a final judgment of the Court of Appeals, an application to a Circuit Justice of this court from a District Court is within the contemplation of the All Writs Act, 28 U.S.C. § 1651(a). I do not understand the respondents to contest this proposition as a matter of law.'

In Williams v. Rhodes (September 10, 1968) 21 L.Ed.2d 69, 70-71 Justice

Stewart notes,

> 'The appellants have presented to me, as Circuit Justice for the Sixth Circuit, a motion for a temporary injunctive order to compel the responsible Ohio authorities to place the names of George C. Wallace, an appellant herein, and Marvin Griffin on the ballot in that state, as Presidential and Vice Presidential candidates.
>
> . . .
>
> 'The parties have not questioned my power to grant the relief sought, but I believe that such power should be used sparingly and only in the most critical and exigent circumstances. . . . [I]n the absence of a temporary order by me at this time, difficult if not in-

surmountable practical problems in the preparation of ballots would result, should the judgment of the United States District Court be reversed by this Court. . . . Under these circumstances, I deem it advisable to grant interim relief until this Court can consider and decide the merits of the appeal. . . . I am authorized to state that the Court has set this case for oral argument on Monday, October 7, 1968. The appellants shall file their jurisdictional statement and docket the case on or before Thursday, September 19. . . . The appellees shall file a motion or motions under Rule 61 by Monday, September 30. Any replies or supplemental briefs shall be filed by Friday,

October 4. The briefs and motions may be typewritten, and the case will be heard on the typewritten certified record.'

Williams v. Rhodes included aspects which are indeed outside the scope of a Circuit Justice's authority, such as scheduling of oral argument and waivers of Court Rules; but Justice Stewart undertook the necessary consultations, and applicants were not required to seek relief directly from the full Court.

"In Matthews v. Little (1969) 396 U.S. 1223 Justice Black, as Circuit Justice, issued an injunction ordering election officials of the city of Atlanta, Georgia to temporarily suspend filing fees and to extend the filing period for an upcoming election. In Fowler v. Adams (1970) 400 U.S. 1205, 1206 Black, J. as Circuit Justice issued a writ of mandamus directing the state

'to take the steps necessary to place the applicant's name on the ballot without payment of the filing fee.' Justice Black ruled that if the applicant were allowed to run for Congress

> 'even if the law is held valid after the applicant's name has been submitted to the voters, neither he nor the public would have suffered irreparable damage. If, on the other hand, the applicant is denied an opportunity to run for office and the Florida law is later invalidated, this candidate would have been unconstitutionally barred from the ballot. In this situation, I think the equities are with the appellant.'

In McCarthy v. Briscoe (September 30, 1976) 429 U.S. 1317 Justice Powell notes:

> 'This is an application for

injunctive relief, [Footnote: Although the application is styled "Application for a partial stay of an order and judgment of the United States Court of Appeals, Fifth Circuit," the applicants actually seek affirmative relief. I have therefore treated the papers as an application for an injunction pursuant to 28 U.S.C. § 1651 and Rules 50 and 51 [now Rules 43 and 44] of this court.] presented to me as Circuit Justice. The applicants, former Senator Eugene J. McCarthy and four Texas voters who support Senator McCarthy's independent candidacy for President, have asked that I order Senator McCarthy's name placed on the 1976 general election

ballot in Texas. They sought relief without success from a three-judge District Court for the Western District of Texas and, on appeal, from the Court of Appeals for the Fifth Circuit. Upon consideration of the record before me, I have concluded that the courts below erred in failing to remedy a clear violation of the applicants' constitutional rights. I have therefore granted the requested relief.' Id. at 1317-1318.

In Meredith v. Fair (1962) 9 L.Ed.2d 43 Justice Black notes:

'This is a motion asking me to vacate orders of [Circuit] Judge Ben F. Cameron . . . [where] movant Meredith, a Negro, had been denied admission

> to the University of Mississippi solely because of his race [and these orders] purport to stay the execution and enforcement of mandates . . . requiring the admission of Meredith to the University of Mississippi at the opening of its new academic year commencing in September 1962.' Id. at 44.

Justice Black granted the motion and issued a writ against any further steps to interfere with Meredith's admission. Justice Black ruled:

> 'In this situation I am satisfied that the court has jurisdiction and power under 28 U.S.C. § 1651 to take such steps as are necessary to preserve the rights of the parties pending final determination of the cause and that 28 U.S.C.

§ 2101(f) and Rule 51 (now Rule 44) of the Rules of this court give the same jurisdiction and power to me as a single Justice of this court.' Id.

"In Re Walter E. Roche Jr. (1980) 448 U.S. 1312, 1316 Justice Brennan issued to Justice Kaplan of the Supreme Judicial Court of Massachusetts protecting applicant's 'First Amendment right to resist intrusion into newsgatherers' confidences.' The Supreme Court has ruled that political rights also enjoy First Amendment protection.

'We have repeatedly held that freedom of association is protected by the First Amendment. And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection

> from infringement by the states. Similarly we have said with reference to the right to vote, "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."' Williams v. Rhodes (1968) 393 U.S. 23, 30-31.

"The precedents cited above clearly indicate that an individual Justice indeed has the authority to issue a mandatory injunction and that elections cases are often a proper occasion for the issuance of such a writ.

"A secondary basis for the refusal of Court clerks to transmit plaintiff's motions was the absence of an

'appealable order' at the time plaintiff sought interlocutory review of the District Court's refusal to rule on motions then pending for more than a year. However, where time-bound rights are involved, protracted delay by the lower court may itself be a proper basis for interlocutory intervention by a Circuit Justice. In Nebraska Press Association v. Hugh Stuart, District Judge (1975) 423 U.S. 1327, Justice Blackmun ruled that excessive delay may constitute a final judgment for jurisdictional purposes and issued a writ to protect time-bound First Amendment rights. Justice Blackmun explained:

> 'A question is initially raised as to my power and jurisdiction . . . . [since] there is no such "final judgment or decree" upon which I

> may act. . . . [However,] any First Amendment infringement that occurs with each passing day is irreparable. . . . In this sense, delay itself is a final decision.' Id. at 1329. Emphasis added.

Another example wherein excessive delay by the lower court was treated as an appealable denial is Volkswagenwerk A.B. v. Falzon (1983) 75 L.Ed.2d 924, 926; there, in defining the 'most extraordinary circumstances' required by Rule 44.4 for the granting of a stay not first denied by the appropriate lower court, Justice O'Connor notes: '[T]he failure of the [lower court] to act promptly should not prevent a member of this court from entertaining an application to stay the order pending final disposition of the appeal in this court.'

"Plaintiff believes that it

should be unnecessary to seek leave to have any motion or application addressed to an individual Justice promptly transmitted to the Justice concerned as Rule 43.1 seems to require. But plaintiff does request that such steps be taken as are necessary to ensure that future submissions which law clerks wish to reject be retained long enough for plaintiff to discuss any defects therein with the clerks and to allow an appeal to his Circuit Justice should plaintiff believe that the circumstances of the case require immediate consideration of his motion or application notwithstanding the misgivings of Court clerks."

#867 APPLICATIONS TO JUSTICE REHNQUIST IN MAY AND JUNE 1984

867.11 Plaintiff notes in his May 19, 1984 application to Justice Rehnquist at 13 Record 64-65: "This application [13 Record 58-97] seeks clarification of your action of May 7, 1984 (RE: Michael J. Halliwell v. March Fong Eu, et al. No. A-872) wherein my submissions to the Court were treated as an application under Rule 43.

"According to the attached letter [13 Record 95] from Assistant Clerk Downs the motions were treated as requests for injunctive relief and denied on this basis. However, neither motion requested the issuance of any injunction but only sought to remove obstacles to your prospective exercise of the Court's jurisdiction over my appeal from a denial of interim injunctive relief by the

three-judge panel conducting proceedings in my case. This appeal will be made as soon as the court reporter completes preparation of an essential hearing manuscript.

"It appears implicit in your action that the relief requested by my motion of April 7, 1984 has been granted, i.e., the appropriateness of a motion to an individual Justice when the motion relates to prospective action in his capacity as Circuit Justice has been acknowledged. It was only because Court clerks refused to transmit my motions of January 27, February 14 and March 20, 1984 that I made this motion to the full Court to secure implementation of Rule 43.1.

"Thus I assume that your denial refers to my April 27, 1984 'Motion for a Demarcation Between Aspects of the Order of March 27, 1984

Appealable to the Ninth Circuit and Those Appealable to the U.S. Supreme Court.' However, if this is so it is not clear whether the denial indicates some defect in the demarcation of my appeal I have suggested or simply declines to give 'such directions as may be appropriate to . . . save to the appellants their proper remedies' as was done in Oklahoma Gas & Electric Co. v. Oklahoma Packing Co. (1934) 292 U.S. 386, 392.

"About a week after I filed my notice of appeal on April 13 I was asked by Mr. Oscar Tagle, a deputy clerk of the Ninth Circuit, to secure from the Supreme Court a demarcation of jurisdiction regarding my appeal, and another deputy clerk called to renew this request on April 27. A similar request has been made directly to the Clerk of the U.S. Supreme Court by Deputy Clerk Matherly

of the Eastern District of California [13 Record 96]. I believe that the time-bound nature of the voting rights involved in my case makes a jurisdictional clarification essential to the proper adjudication of these rights. Therefore I have set forth the various jurisdictional and procedural questions involved in my appeal in a series of motions, the disposition of which will remove existing ambiguities concerning how I should proceed with my appeal from the District Court's order of March 27, 1984."

867.21 Plaintiff argued, in his June 11, 1984 letter to Clerk of the U.S. Supreme Court Alexander L. Stevas, at 13 Record 203: "I much appreciate your having my submission of April 27 forwarded to Justice Rehnquist, but whatever instructions you issued must have miscarried; for Ms.

Downs subsequently notified me that Justice Rehnquist had issued a ruling which bears no relation to the nature of the motions submitted, and when I sought clarification she rejected by application, informing me that clarifications are not issued by individual Justices.

"The treatment of two procedural motions as if they were an application for an injunction, followed by refusal to foward an application designed to untangle the resulting confusion, leaves my case in limbo, since the request of the Ninth Circuit and the Eastern District of California (made to me and to you, respectively) for jurisdictional clarification from the Supreme Court remains unanswered: the Court has neither provided such clarification nor said that it will not do so. It will be easy to rectify this

situation, as I framed my request for clarification in the form of four motions each of which a Justice can either grant or deny or decline to rule upon for jurisdictional reasons.

"I herewith resubmit my request for clarification and the two motions which were mistakenly treated as an application for injunction and denied accordingly. I am adding a very short explanation of the procedural situation as it now exists and of why some sort of ruling is essential in a letter of conveyance to Justice Rehnquist. Thank you for your assistance in this matter."

867.31 Plaintiff argued in his June 11, 1984 letter to Justice Rehnquist at 13 Record 202:

"Halliwell v. Eu, a statewide reapportionment case, was filed on February 19, 1982, but in spite of the requirement

of 28 U.S.C. § 2284(b)(2), which provides, 'the hearing shall be given precedence, and held at the earliest practicable day,' nothing of substance has yet been adjudicated by the three-judge panel conducting proceedings in this case. On January 27, 1984 and on two subsequent occasions plaintiff made application to his Circuit Justice seeking enforcement of the expedited consideration requirement of § 2284.

"These applications were rejected, either without citing any rule of the Court or citing a rule that was plainly inapplicable. Therefore on April 7, 1984 plaintiff attempted to file a motion under Rule 42 to secure the enforcement of Rule 43.1. This motion was rejected by the same clerk (Ms. Katherine Downs) who had rejected two of the three prior motions. After appealing to the Clerk of the Court plaintiff was finally

allowed to file the motion of April 7, along with a second motion relating to jurisdictional questions raised by the Ninth Circuit in connection with a forthcoming appeal. However, the motion seeking enforcement of Rule 43 and the motion seeking jurisdictional clarification were somehow construed as an application for an injunction and denied on that basis. Shortly after this May 7, 1984 ruling Deputy Clerk Marianne Matherly of the Eastern District renewed the Ninth Circuit's request for jurisdictional clarification. To facilitate this, plaintiff made application on May 21, 1984 for clarification of the ruling of May 7. But this was rejected by Ms. Downs on the grounds that 'It is not the practice of the Justices of this court to issue clarifications regarding rulings on applications to individual Justices.'

Since the May 7 ruling treated motions which were not a request for an injunction as if they were, the parties to Halliwell v. Eu, the District Court, and the Ninth Circuit are left bewildered.

"The request for clarification which is herewith resubmitted is structured so that all that is required to untangle the present situation is a simple granting or denial (or rejection on jurisdictional grounds) for each of the four motions included. To facilitate consideration of this matter, copies of the two motions [12 Record 290-293, 432-436] which were the subject of the May 7 ruling and the letter of Ms. Downs [13 Record 204] communicating that ruling to the parties are also enclosed."

PROOF OF SERVICE BY MAIL

I, Betty Halliwell, am a citizen of the United States and am self employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My home address is that of 2930 Colorado Avenue #D-18, Santa Monica, California.

On July 27, 1987 I served the accompanying "Categories from Case Record Appendix" via first-class mail with postage fully prepaid at Los Angeles, California on the attorneys of record for defendants Secretary of State, Assembly, and Senate of California, the Supreme Court of California, and the members of the three-judge District Court:

Anthony L. Miller, Chief Counsel
1230 J Street
Sacramento, CA 95814

Joseph Remcho, Chief Counsel
Remcho, Johansen & Purcell
220 Montgomery St., Suite 606
San Francisco, CA 94104

Deputy Atty. General Carol Hunter
1515 K Street, Suite 511
Sacramento, CA 95814

Teresa M. Ferguson
Tuohey & Prasse
1200 N. Main St., Suite 800
Santa Ana, CA 92701

Benjamin Schiebe
Browne & Woods
450 No. Roxbury Drive, 7th Floor
Beverly Hills, CA 90210

The Hon. Lawrence K. Karlton
U.S. District Court
650 Capitol Mall
Sacramento, CA 95814

The Hon. Raul A. Ramirez
U.S. District Court
650 Capitol Mall
Sacramento, CA 95814

The Hon. Anthony M. Kennedy
Ninth Circuit Court of Appeals
555 Capitol Mall, Suite 1400
Sacramento, CA 95814

Executed on July 27, 1987 at Santa Monica, California. I declare under penalty of perjury, pursuant to California law, that the above is true and correct.

_____

Betty Halliwell, Ph.D.
(Signature)